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**Supreme Court of the United States**

**OCTOBER TERM, 1963**

**No. 550**

**79**

**2,872.88 ACRES OF LAND, ETC., ET AL.,  
PETITIONERS,**

**vs.**

**UNITED STATES.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED FEBRUARY 21, 1963.  
CERTIORARI GRANTED APRIL 22, 1963**

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA,  
COLUMBUS DIVISION.

UNITED STATES OF AMERICA,  
Plaintiff,

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER ET AL. AND  
UNKNOWN OWNERS,  
Defendants.

Civil No. 789

**COMPLAINT IN CONDEMNATION.**

(Filed May 15, 1959. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

1.

This is an action of a civil nature brought by the United States of America at the request of the Secretary of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2.

The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April

24, 1888 (25 Stat. 94, 33 U.S.C. 591), which act authorizes the acquisition of land for river and harbor purposes; the Act of Congress approved July 24, 1946 (Public Law 525, 79th Congress), which act authorizes the construction of the Fort Gaines Lock and Dam, which said lock and dam, by Public Law 85-363, approved March 28, 1958, has been redesignated the Walter F. George Lock and Dam; and the Act of Congress approved September 2, 1958 (Public Law 85-863), which act appropriated funds for such purposes.

The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the construction, repair and preservation of certain public works of rivers, harbors and waterways, and for other uses incident thereto. The said land has been selected for acquisition by the United States for use in connection with the establishment of the Walter F. George Lock and Dam, Georgia and Alabama, and for such other uses as may be authorized by Congress or by Executive Order.

The interests in the property to be acquired are as follows:

- (a) The fee simple title to Tracts E-524, H-805, H-806, M-1301, M-1306, M-1321, M-1324, M-1330, M-1333, M-1334, and M-1348, together with all right, title or interest in and to the banks, beds and waters of any streams opposite to or fronting upon said land, subject, however, to existing easements for public roads and highways, pub-

lic utilities, railroads and pipelines, and also, with respect to Tract E-524, subject to the burial easement or rights of the next of kin in the bodies interred in an unnamed cemetery located thereon, and constituting a part thereof, designated as Tract E-524-C, a description of which is set out in Schedule "A" hereof.

(b) The perpetual right, power, privilege and easement in, upon, over and across Tracts H-805-E-1, H-805-E-2, H-805-E-3, H-805-E-4, H-806-E, M-1301-E-1, M-1301-E-2 and M-1306-E, for the purposes set forth below, together with all right, title, and interest in and to the structures and improvements now situate on the land, and all right, title, and interest in and to the timber situate below elevation 192 feet above Mean Sea Level.

(1) Permanently to overflow, flood, and submerge the land lying below elevation 192 feet above Mean Sea Level and to maintain mosquito control in connection with the operation and maintenance of the Walter F. George Lock and Dam project as authorized by the Act of Congress approved July 24, 1946 (Public Law 525, 79th Congress), together with the continuing right to clear and remove any brush, debris, and natural obstructions which, in the opinion of the representative of the United States in charge, may be detrimental to the operation of the project.

(2) Occasionally to overflow, flood, and submerge the land lying above elevation 192 feet above Mean Sea Level and to maintain mosquito control in connection with the operation and maintenance of said project.

(3) Provided that no structure for human habitation shall be constructed or maintained on said land, and pro-

4

vided further that no other structures shall be constructed or maintained on said land except as may be approved in writing by said representative of the United States in charge of the project.

(4) As to the described land in which easements are taken, all rights and privileges which may be used and enjoyed without interfering with or abridging the rights and easements hereby taken are specifically reserved to the respective owners, their heirs and assigns: the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

5.

The property so to be taken is described in Schedule A hereto attached. The property which is the subject matter of this proceeding is located in Clay and Quitman Counties, Georgia.

6.

The persons having or claiming an interest in the property, including taxing authorities, whose names are now known are:

#### AS TO ALL TRACTS

The Governor of Georgia	Atlanta, Georgia
The Secretary of State	Atlanta, Georgia
The Attorney General of Georgia	Atlanta, Georgia
State Highway Board	Atlanta, Georgia
County Commissioners of Clay County	Ft. Gaines, Georgia

County Commissioners of Quitman  
County

Georgetown, Georgia

The Ordinary of Clay County, Ga.,  
or the Clerk of the Superior  
Court of said County, if the  
Ordinary be disqualified, pur-  
suant to Section 36-310 of the  
Code of Georgia of 1933

Ft. Gaines, Georgia

The Ordinary of Quitman County,  
Ga., or the Clerk of the Superior  
Court of said County, if the  
Ordinary be disqualified, pur-  
suant to Section 36-310 of the  
Code of Georgia of 1933

Georgetown, Georgia

Board of County Tax Assessors,  
Clay County, Ga.

Ft. Gaines, Georgia

Board of County Tax Assessors,  
Quitman County, Ga.

Georgetown, Georgia

Tax Commissioner, Clay County,  
Ga.

Ft. Gaines, Georgia

Tax Commissioner, Quitman  
County, Ga.

Georgetown, Georgia

#### TRACTS H-805

H-805-E-1

H-805-E-2

H-805-E-3

H-805-E-4

Hoke S. Lindsay

Route 2  
Georgetown, Georgia

Bank of Abbeville

Abbeville, Alabama

#### TRACTS M-1306

M-1306-E

A. J. Watson

Route 2  
Georgetown, Georgia

6.

Dawson Productive Credit Association

Alto Williams

C. J. Hardiman

Mrs. Willie Jackson

Georgia Power Company

Dawson, Georgia

Route 2

Georgetown, Georgia

Route 2

Georgetown, Georgia

Route 2

Georgetown, Georgia

Atlanta, Georgia

All the parties in possession of the lands herein sought to be condemned whose identities and addresses are unknown.

7.

In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are not known to the plaintiff and such persons are made parties to this action under the designation "Unknown Owners."

8.

An option for purchase of land determining the amount of just compensation payable by plaintiff has been entered into with Mrs. Lillie B. McDaniel Hinson and William Lucas Hinson, son of Mrs. Hinson, in connection with Tract No. M-1334 herein.

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for

the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Frank O. Evaris,  
United States Attorney,

By /s/ Truett Smith,  
Truett Smith,  
Assistant United States Attorney,

Address:

P. O. Box 118,  
Macon, Georgia.

### DEMAND FOR JURY.

Trial by jury of the issue of just compensation is demanded by plaintiff this 15th day of May, 1959.

/s/ Truett Smith,  
Truett Smith,

Assistant United States  
Attorney.

### SCHEDULE "A"

#### DESCRIPTION:

#### TRACT H-805

All that tract or parcel of land lying and being in Land Lots 388, 389, 411, and 412 and Fractional Land Lots 413, 414, and 421, Seventh Land District, Clay County, Georgia, and being more particularly described as follows:

Beginning at a point which is on the South line of said Land Lot 389 a distance of 1150 feet West of the Southeast corner of said Land Lot 389;

thence West along the South lines of said Land Lots 389, 411 and 414 a distance of 5850 feet, more or less, to the left bank of the Chattahoochee River;

thence North and Northwesterly upstream along the meanders of said left bank 7500 feet, more or less, to the North line of said Land Lot 421 which is the South boundary of Quitman County;

thence East along the North lines of Land Lots 421, 413, and 412 a distance of 6450 feet, more or less, to a point 1900 feet West of the Northeast corner of said Land Lot 412;

thence S  $11^{\circ}$  E 725 feet, more or less, to a point which is 700 feet South of the North line and 1750 feet West of the East line of said Land Lot 412;

thence S  $30^{\circ}$  E 1025 feet, more or less, to a point which is 1250 feet West of the East line and 1600 feet South of the North line of said Land Lot 412;

thence S  $45^{\circ}$  E 650 feet, more or less, to a point which is 750 feet West of the East line and 2050 feet South of the North line of said Land Lot 412;

thence East along a line parallel to the North line of said Land Lot 412 a distance of 500 feet;

thence N  $60^{\circ}$  E 500 feet, more or less, to a point which is 200 feet East of the West line and 1800 feet South of the North line of said Land Lot 388;

thence S  $30^{\circ}$  E 300 feet, more or less, to a point which is 350 feet East of the West line and 2050 feet South of the North line of said Land Lot 388;

thence N 60° E 450 feet, more or less, to a point which is 750 feet East of the West line and 1850 feet South of the North line of said Land Lot 388;

thence South along a line parallel to the West line of said Land Lot 388 a distance of 350 feet;

thence East along a line parallel to the North line of said Land Lot 388 a distance of 1750 feet, more or less, to a point 700 feet West of the East line of said Land Lot 388;

thence S 40° W 600 feet, more or less, to a point which is 250 feet North of the South line and 1125 feet West of the East line of said Land Lot 388;

thence West along a line parallel to the South line of said Land Lot 388 a distance of 1200 feet;

thence South along a line parallel to the East line of said Land Lots 388 and 389 a distance of 1775 feet;

thence S 45° E 1350 feet, more or less, to a point which is 1350 feet West of the East line and 175 feet North of the South line of said Land Lot 389;

thence East along a line parallel to the South line of said Land Lot 389 a distance of 200 feet;

thence South along a line parallel to the East line of said Land Lot 389 a distance of 175 feet, more or less, to the point of beginning.

AND all that tract or parcel of land lying and being in Land Lots 337 and 367 and Fractional Land Lot 368, Eighth Land District, Quitman County, Georgia, being more particularly described as follows: ○

Beginning at a point which is on the South line of said Land Lot 337 a distance of 2150 feet West of the Southeast corner of said Land Lot 337;

thence West along the South line of said Land Lots 337, 367, and 368 a distance of 6450 feet, more or less, to the left bank of the Chattahoochee River;

thence Northwesterly and Northeasterly along said left bank of the Chattahoochee River 2100 feet, more or less, to a corner of a tract of land now or formerly owned by Elizabeth G. Logue;

thence East along the boundary of said Logue tract 5400 feet, more or less, to the East line of said Land Lot 367;

thence South along the East line of said Land Lot 367 a distance of 450 feet, more or less, to a corner of a tract of land now or formerly owned by David L. Mason;

thence N  $86^{\circ}$  E 100 feet, more or less, to a point 100 feet East of the West line of said Land Lot 337;

thence S  $10^{\circ}$  E 525 feet, more or less, to a point which is 700 feet North of the South line and 200 feet East of the West line of said Land Lot 337;

thence S  $36^{\circ}$  E 1000 feet, more or less, to the point of beginning.

The land described hereinabove contains a net total of 963.00 acres, more or less, and designated as Tract H-805 of the Walter F. George Lock and Dam.

#### TRACT H-805-E-1

All that portion of Land Lot 388, Seventh Land District, Clay County, Georgia, that lies below the contour at

Elevation 197.0 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is 700 feet West of the East line and 2200 feet South of the North line of said Land Lot 388;

thence West along a line parallel to the North line of said land lot a distance of 200 feet;

thence North along a line parallel to the East line of said land lot a distance of 500 feet;

thence East along a line parallel to the South line of said land lot a distance of 700 feet;

thence South along a line parallel to the East line of said land lot a distance of 1000 feet, more or less, to a point 250 feet North of the South line of said land lot;

thence West along a line parallel to the South line of said land lot a distance of 925 feet;

thence N 30° E 600 feet, more or less, to the point of beginning.

Containing 2.10 acres, more or less, and designated as Tract H-805-E-1 of the Walter F. George Lock and Dam.

#### TRACT H-805-E-2

All that portion of Land Lot 388, Seventh Land District, Clay County, Georgia, that lies below the Contour at Elevation 197.0 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is 200 feet East of the West line and 1800 feet South of the North line of said Land Lot 388;

thence N 60° E 1050 feet, more or less, to a point which is 1100 feet East of the West line and 1300 feet South of the North line of said land lot;

thence South along a line parallel to the West line of said land lot a distance of 900 feet;

thence West along a line parallel to the North line of said land lot a distance of 350 feet;

thence North along a line parallel to the West line of said land lot a distance of 350 feet;

thence S 60° W 450 feet, more or less, to a point which is 350 feet East of the West line and 2050 feet South of the North line of said land lot;

thence N 30° W 300 feet, more or less, to the point of beginning.

Containing 3.40 acres, more or less, and designated as Tract H-805-E-2 of the Walter F. George Lock and Dam.

#### TRACT H-805-E-3

All that portion of Land Lot 389, Seventh Land District, Clay County, Georgia, that lies below the contour at Elevation 197.0 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is 1525 feet South of the North line and 2325 feet West of the East line of said Land Lot 389;

thence North along a line parallel to the East line of said land lot a distance of 900 feet;

thence East along a line parallel to the North line of said land lot a distance of 900 feet;

thence South along a line parallel to the East line of said land lot a distance of 900 feet;

thence West along a line parallel to the North line of said land lot a distance of 900 feet to the point of beginning.

Containing 3.40 acres, more or less, and designated as Tract H-805-E-3 of the Walter F. George Lock and Dam.

#### TRACT H-805-E-4

All that portion of Land Lot 389, Seventh Land District, Clay County, Georgia, that lies below the contour at Elevation 197.0 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is 1525 feet South of the North line and 2325 feet West of the East line of said Land Lot 389;

thence East along a line parallel to the North line of said land lot a distance of 975 feet;

thence South along a line parallel to the East line of said land lot a distance of 1000 feet, more or less, to a point 175 feet North of the South line of said land lot;

thence N 45° W 1350 feet, more or less, to the point of beginning.

Containing 1.80 acres, more or less, and designated as Tract H-805-E-4 of the Walter F. George Lock and Dam.

Tracts H-805, H-805-E-1, H-805-E-2, H-805-E-3, and H-805-E-4 contain in the aggregate 973.70 acres, more or less, and being a part of the same land described in a deed from T. W. Mobley to Hoke S. Lindsey, dated 9 December

1944 and recorded in Deed Book P, page 109, of the records in the office of the Clerk of the Superior Court of Clay County, Georgia.

### SCHEDULE "A"

#### DESCRIPTION:

#### TRACT M-1306

All that tract or parcel of land lying and being in Land Lots 325, 326, 347, 348 and 349, Eighth Land District, Quitman County, Georgia, and being more particularly described as follows:

Beginning at the Southwest corner of Land Lot 348; thence North along the West line of said Land Lot 348 a distance of 950 feet, more or less, to the center of Tolanee Creek;

thence Easterly upstream along the meanders of the center line of said creek 1600 feet, more or less, to a corner of a tract of land now or formerly owned by J. R. Ogletree;

thence N 05° E along the boundary of said Ogletree tract 2700 feet, more or less, to a corner of a tract of land now or formerly owned by J. T. Hart, et al;

thence S 88° E along the boundary of said Hart tract 625 feet, more or less, to the boundary of a tract of land now or formerly owned by Central of Georgia Railway Company;

thence S 10° W along the boundary of said Railway tract 75 feet, more or less, to a corner of said Railway tract;

thence S 80° E along the boundary of said Railway tract 475 feet, more or less, to a corner of a tract of land now or formerly owned by J. T. Hart, et al;

thence S 03° W along the boundary of said Hart tract 1925 feet, more or less, to the center of said Tobannee Creek;

thence Easterly upstream along the meanders of the center line of said creek 2450 feet, more or less, to the boundary of a tract of land now or formerly owned by said Central of Georgia Company;

thence S 10° E along the boundary of said Railway tract 15 feet, more or less, to a corner of said Railway tract;

thence N 80° E along the boundary of said Railway tract 15 feet, more or less, to a corner of said Railway tract;

thence Southerly along the boundary of said Railway tract 1425 feet, more or less, to the South line of said Land Lot 325;

thence West along the South line of said Land Lot 325, a distance of 200 feet, more or less, to a point 1750 feet West of the Southeast corner of said Land Lot 325;

thence N 45° W 400 feet, more or less, to a point which is 300 feet North of the South line and 2000 feet West of the East line of said Land Lot 325;

thence West along a line parallel to the South line of said Land Lot 325 a distance of 300 feet;

thence South along a line parallel to the East line of said Land Lots 325 and 326 a distance of 1250 feet;

thence S 45° W 650 feet, more or less, to a point which is 2750 feet West of the East line and 1550 feet North of the South line of said Land Lot 326;

thence South along a line parallel to the East line of said Land Lot 326 a distance of 525 feet, more or less, to the boundary of a tract of land now or formerly owned by Richard B. Gary;

thence West along the boundary of said Gary tract 3500 feet, more or less, to the West line of said Land Lot 347;

thence North along the West line of said Land Lot 347 a distance of 1975 feet, more or less, to the point of beginning.

Containing 330.00 acres, more or less, and designated as Tract M-1306 of the Walter F. George Lock and Dam.

#### TRACT M-1306-E

All that portion of Land Lots 325 and 326, Eighth Land District, Quitman County, Georgia, that lies below the contour at Elevation 198.3 feet above Mean Sea Level and within a portion of said land lots described as follows:

Beginning at a point which is 2300 feet West of the East line and 950 feet South of the North line of said Land Lot 326;

thence North along a line parallel to the East lines of said Land Lots 326 and 325 a distance of 1250 feet;

thence East along a line parallel to the South line of said Land Lot 325 a distance of 300 feet;

thence S 45° E 400 feet, more or less, to a point which is on the South line of said Land Lot 325 a distance of 1750 feet West of the Southeast corner of said Land Lot 325;

thence East along the South line of said Land Lot 325 a distance of 200 feet, more or less, to the boundary of a tract of land now or formerly owned by Central of Georgia Railway Company;

thence Southeasterly along the boundary of said Railway tract 1000 feet, more or less, to a point 950 feet South of the North line of said Land Lot 326;

thence West along a line parallel to the North line of said Land Lot 326 a distance of 1200 feet, more or less, to the point of beginning.

Containing 7.58 acres, more or less, and designated as Tract M-1306-E of the Walter F. George Lock and Dam.

Tracts M-1306 and M-1306-E contain in the aggregate 337.58 acres, more or less, and being a part of the same land described in a deed to A. J. Watson from J. H. Gordon, dated 31 January 1949 and recorded in Deed Book 30, page 64 and substantially the same land described in a deed to Annis J. Watson and J. H. Gordon, dated 31 December 1937 and recorded in Deed Book 23, page 579 of the records in the office of the Clerk of the Superior Court of Quitman County, Georgia.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS AND ALBANY DIVISIONS**

**UNITED STATES OF AMERICA,**

**v.**

**2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS**

**UNITED STATES OF AMERICA,**

**v.**

**1,361.09 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA,  
AND CAROLYN GAVIN GIBSON,  
ET AL.; AND UNKNOWN OWN-  
ERS**

**Civil Action  
No. 789**

**Civil Action  
No. 792**

**ORDER APPOINTING COMMISSIONERS.**

(Filed December 22, 1959. John P. Cowart, Clerk  
United States District Court.)

After hearing from counsel and after considering the facts involved, and it appearing to the court that in these proceedings plaintiff, The United States of America, is condemning various tracts of land and various easements in connection with the Walter F. George Lock and Dam Project, and in connection with the Columbia Lock and Dam Project (all of said civil actions being in connection with the Walter F. George Lock and Dam Project, except Civil Action No. 608, which relates to the Columbia Lock and Dam Project, and it appearing that in all probability additional civil actions will be instituted in connection with

the last named project), and the court being of the opinion and hereby determining that because of the character, location and quantity of the property being condemned, and in the interest of justice, the issue of compensation should be determined by a Commission, one advantage of such determination being the facility with which Commissioners may inspect the property, and another being uniformity of award as to the various tracts involved, and another being the expedition with which awards can be finally determined as compared to jury trial, it is, therefore,

ORDERED that the issue of just compensation in these proceedings be and it is hereby referred to three Commissioners, as follows: Mallory C. Atkinson, of Macon, Georgia, who shall act as Chairman of the Commission, J. P. Champion, of Albany, Georgia, and Hines Preston, of Columbus, Georgia.

The above named Commissioners shall have the powers of a master, and shall be governed by the provisions of Rule 53, Federal Rules of Civil Procedure, insofar as they are applicable.

Lest the statement recently repeated in footnote 5 in the case of *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), that "there is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee" be proven true, it is hereby further

ORDERED in accordance with Rule 53(d), Federal Rules of Civil Procedure, that the Commissioners shall forthwith set a time and place for the first meeting of the

parties and their attorneys to be held within 30 days after the date of this order, and it is hereby further

ORDERED that the Chairman of this Commission make a progress report to this court, in writing, immediately after its first meeting, and monthly thereafter pending the filing of the Commission's final report.

This 22nd day of December, 1959.

/s/ W. A. Bootle;

United States District Judge.

This is to certify that I have this day mailed a copy of the within order and a copy of Instructions To Commissioners to Mr. Mallory C. Atkinson, Attorney at law, First National Bank Bldg., Macon, Ga., and to Mr. J. P. Champion, P. O. Box 165, Albany, Ga.; Mr. Hines Preston, 1109 Lockwood Ave., Columbus and Mr. Frank O. Evans, U. S. Attorney, Macon, Ga. This Dec. 22, 1959.

/s/ John P. Cowart,

Clerk.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS AND ALBANY DIVISIONS

UNITED STATES OF AMERICA,

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

Civil Action  
No. 789

UNITED STATES OF AMERICA,

v.

1,361.09 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA,  
AND CAROLYN GAVIN GIBSON,  
ET AL., AND UNKNOWN OWN-  
ERS

Civil Action  
No. 792

INSTRUCTIONS TO COMMISSIONERS.

(Filed December 22, 1959. John P. Cowart, Clerk,  
United States District Court.)

Because of this court's confidence in your integrity, your impartiality, your personal disinterestedness in the proceeding and its results, and your intelligence and ability to discharge the duties imposed upon you, you have been selected and appointed to serve on a Commission in accordance with the provisions of Rule 71 A(h), Federal Rules of Civil Procedure, in the above captioned actions. These instructions are given to guide and assist you.

Your principal duty will be to determine the amount of just compensation which the United States of America should pay to each of the land owners for the estates or

easements acquired in these condemnation proceedings. In making your determination there are certain rules you should follow. It is not contemplated, however, that these instructions shall cover in detail all of your duties, nor touch upon all matters of procedure. You have the powers of a master provided in subsection (c) of Rule 53, Federal Rules of Civil Procedure, and proceedings before you shall be governed by the provisions of paragraphs (1) and (2) of subsection (d) of said Rule 53, to which you should refer.

There is no question as to the Government's right to condemn the property it is condemning. Likewise, there is no question as to the applicability of the Constitutional provision "nor shall private property be taken for public use, without just compensation."

"Just compensation" is frequently and generally regarded as synonymous with "fair market value". When the Government condemns an entire tract of land the sole inquiry is as to the fair market value of the property taken. Sometimes, however, the Government condemns only a portion of a tract, leaving to the owner the remaining portion of the tract. In such case, just compensation equals the fair market value of the portion taken, plus damages, if any, resulting to the portion not taken because of the taking, or because of the use to which the taken portion is to be put. This latter element is known as "severance damages".

The term "fair market value" means the amount of money the property would bring in cash in the open market when sold by a person desiring and willing to sell, but not

obliged to sell, and bought by a person able, desiring and willing to buy, but not obliged to buy. In all cases the fair market value of the property must be determined as of the date of taking—not as of a previous or subsequent date.

In arriving at the fair market value you may consider the uses to which the property was being put on the taking date and you should consider also any other uses to which you find it may have readily been converted, including the highest and best use to which you find it may readily have been converted. In this connection, you should consider only probable uses and not possible or imaginary uses. Possible or imaginary uses would be too remote and speculative. If you should find from the evidence, for example, that certain lands here involved were, on the date of taking, suitable and adaptable for subdivision into small lots or parcels and that such future use of the property was its highest and best use, you must determine the market value in the light of such use, but you are not to arrive at the market value as though the property had already been actually put to such use, unless you find that it had already been put to such use. In other words, you should fix the market value in the light of the highest and best adaptable use of the property for which a market demand exists on the date of the taking, but not as if already adapted to such prospective use. If you should determine that any of the property here involved should be valued on the basis of its suitability and adaptability for subdivision purposes, you should fix that value at a price which you believe a willing buyer and seller would have agreed upon for the property in its condition as of the taking date. In other

words, if the land on the date of taking was undeveloped land, but suitable and adaptable for subdivision purposes, your value under such circumstances would be the price which would have been agreed upon between a willing buyer and a willing seller for undeveloped land with such suitability and adaptability, but not the aggregate retail value of the component parts into which the property had not been subdivided but might thereafter be subdivided.

In determining market value you may consider sales of similar property in the area made either prior to or after, but not remote from, the date of the taking of the property involved. You may also consider a number of other factors including the physical characteristics of the property, its situation in relation to the points of importance in the neighborhood, and the opinion of competent experts. You, of course, are not bound by anyone's opinion and you should follow anyone's opinion only insofar as it impresses you as being reasonable and correct. You should evaluate an expert's opinion and testimony according to the same standards by which you evaluate the testimony of other witnesses. Consider the ability and character of the witness, his actions upon the stand, the weight and process of the reasoning by which he has supported his opinion, his bias or prejudice, if any exists, his interest or lack of interest in the outcome of the hearing, his opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements.

Just compensation is the sum which will put the owner in as good a position pecuniarily, that is financially, as he

would have been in if the property had not been taken—no richer and no poorer. Your duty is to see that the compensation is just not merely to the individual whose property is taken, but also to the public which is to pay for it; and to state that both ways, not merely to the public which is to pay for it, but also to the individual whose property is taken.

You may view the tracts of land involved in these proceedings. The viewing of the land would not be for the purpose of making yourself a witness in the case, but for the purpose of aiding you in better understanding the evidence that will be given.

You will, of course, hold a hearing, or hearings, as contemplated by the rules above mentioned, and you will proceed with all due diligence as is contemplated by said rules. The burden of proof is upon the property owner in each instance to establish by competent evidence the amount of just compensation to which he is entitled. The normal order of procedure, therefore, would be for you to hear first the property owners' evidence and then the Government's.

The Chairman of the Commission is an experienced attorney, and he should determine the admissibility or inadmissibility of any evidence offered by any party.

All members of the Commission have the right to make such examination of any witness as they may desire.

All witnesses shall be placed under oath before testifying.

A competent reporter will be made available to report the proceedings at all hearings.

At the conclusion of your hearing or hearings you shall file a written report with the Clerk of this court setting forth separately your findings of fact and conclusions of law and the amount of just compensation to which you think each property owner or claimant is entitled. The action and report of the Commission shall be determined by a majority.

Before entering upon your duties, and not later than the beginning of your first hearing, each of you shall take and subscribe an oath substantially as follows:

"We, Mallory C. Atkinson, J. P. Champion and Hines Preston, having heretofore been appointed Commissioners in the above entitled causes (stating the causes in the caption of the oath) do solemnly swear that we will faithfully and impartially perform our duties as such Commissioners, agreeable to the order of the court, to the best of our ability and understanding SO HELP US GOD.

"This \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If some unanticipated problem should arise in the performance of your duties as Commissioners you may at any time ask the court for additional instructions.

This 22 day of December, 1959.

/s/ W. A. Bootle,

United States District Judge

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS AND ALBANY DIVISIONS**

**UNITED STATES OF AMERICA**

v.

**2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS**

**UNITED STATES OF AMERICA**

v.

**1,361.09 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA,  
AND CAROLYN GAVIN GIBSON,  
ET AL., AND UNKNOWN OWN-  
ERS**

**CIVIL ACTION  
No. 789**

**CIVIL ACTION  
No. 792**

**AMENDMENT TO ORDERS APPOINTING  
COMMISSIONERS.**

(Filed June 30, 1960. John P. Cowart, Clerk,  
United States District Court.)

The Court having entered original orders in the above captioned actions on December 22, 1959 and April 28, 1960, appointing Commissioners and referring to them for determination the issues of just compensation involved in such actions, and good cause having been shown;

**IT IS HEREBY CONSIDERED, ORDERED AND AD-  
JUDGED** that said original orders be and they are hereby amended and supplemented so as to provide that such Commissioners shall not be required to file, with any reports made by them to the Court, any transcript of the proceed-

ings or evidence had at any hearing held before them in connection with their determination of the issues of just compensation involved in these actions.

IT IS FURTHER ORDERED that this amendment to the said original orders shall be and is hereby made retroactive in its effect to December 22, 1959 and April 28, 1960, as to each of said orders respectively and in addition applies to all future hearings held by said Commissioners in the above captioned actions.

IT IS FURTHER ORDERED that the Commissioners shall file all physical exhibits admitted into evidence upon any hearing held by them with the Clerk of this Court in the Albany or Columbus Division of this District as the case may be, and said Clerk is hereby directed to file such exhibits in the particular civil action to which the same shall be applicable.

SO ORDERED AND ADJUDGED, this 30 day of June, 1960.

/s/ W. A. Bootle,

United States District Judge.

This is to certify that I have this day mailed a copy of the within to Honorable Mallory C. Atkinson, attorney at law, First National Bank Building, Macon, Georgia.

This 30th day of June, 1960.

/s/ John P. Cowart.

**ORDER ON PRE-TRIAL HEARING BEFORE  
COMMISSIONERS.**

(Filed July 6, 1960. H. Okay Parker, Deputy Clerk,  
United States District Court.)

Pursuant to notice to all parties pre trial hearing was held before the Commissioners at the United States Court House in Columbus, Georgia, beginning at 10:00 o'clock a.m. on Thursday, June 30, 1960. Appearing for the Government were Mr. Frank O. Evans, United States Attorney, and Mr. Truett Smith, Assistant United States Attorney. Appearing for the Land Owners were the following:

As to Tract E-524 Mr. Frank Humber in person and his counsel Messrs. Jesse Bowles and Forrest Champion, Mrs. Sarah Lokey King and Mr. Stanley A. Lokey:

As to Tracts H 805, H 805 E1, H 805 E2, H 805 E3 and H 805 E4 Messrs. Bowles and Champion as counsel for Mr. Hoke S. Lindsay:

As to Tracts H 806 and H 806 E Messrs. Grubb and Maistre as counsel for Mrs. Elizabeth G. Logue:

As to Tracts M 1301, M 1301 E1 and M 1301 E2 Messrs. Bowles and Champion as counsel for Mr. Richard B. Gary:

As to Tracts M 1306 and M 1306 E Messrs. Bowles and Champion as counsel for Mr. A. J. Watson:

As to Tracts M 1321, M 1324, M 1330, M 1333 and M 1334 there was no appearance by or for the property owners.

As to Tract M 1348 Mr. A. Edward Smith as counsel for Mr. F. M. Methvin.

Dates were assigned for inspection of the premises by the Commissioners as follows:

The Commissioners will meet with representatives of the Government and representatives of the Land Owners at the Court House in Georgetown, Georgia, at 10:00 o'clock a.m. on Saturday, July 16, 1960 for inspection of Tracts H 805, H 805 E1, H 805 E2, H 805 E3, H 805 E4, H 806, H 806 E, and M 1348.

The Commissioners will meet with representatives of the Government and representatives of the Land Owners at the Court House in Georgetown, Georgia, at 10:00 o'clock a.m. on Monday, July 25, 1960, for inspection of Tracts E 524, M 1301, M 1301 E1, M 1301 E2, M 1306 and M 1306E.

Dates were assigned for evidentiary hearings before the Commission as follows:

As to Tracts M 1348, H 806 and H 806 E, evidentiary hearings will commence at 10:00 o'clock a. m. on Monday, July 18, 1960.

As to all other Tracts evidentiary hearings will commence at 10:00 o'clock a.m. on Tuesday, July 26, 1960.

All evidentiary hearings will be held in the United States Court Room in Columbus, Georgia.

As to Tract M 1348 it was agreed that each side would be limited to the offering of not more than three comparable sales and no such sale would ante date the date of the declaration of taking by more than five years.

As to Tracts H 806 and H 806 E it was agreed that each side would be limited to the offering of not more than five

comparable sales and no such sale would ante date the date of the declaration of taking by more than five years.

Counsel present agreed to make informal discovery between themselves before the commencement of the evidentiary hearing, to further consider the feasibility of consolidation of any of the Tracts for hearing, and it was further agreed that counsel would not insist upon the strict requirements of identification and authentication of maps, plats, photographs, aerial photographs, deeds and records.

This July 5, 1960, nunc pro tunc for June 30, 1960.

Mallory C. Atkinson,  
J. P. Champion,  
Hines Preston,  
Commissioners.

By /s/ Mallory C. Atkinson,  
Mallory C. Atkinson,  
Chairman.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DISTRICT

United States of America,

vs.

2,872.88 acres of land, more or less,  
situate in Clay and Quitman  
Counties, State of Georgia, and  
Frank Humber et al. and unknown  
owners.

Civil Action

No. 789

Tracts No.

H805,

H805E1,

H805E2,

H805E3,

H805E4.

**REPORT OF COMMISSIONERS.**

(Filed August 19, 1960. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

To the Honorable W. A. Bootle, United States Judge for  
the Middle District of Georgia:

Pursuant to notice given to all parties concerned, the  
evidentiary hearing on condemnation of the above listed  
tracts was held in the United States Court Room in Colum-  
bus, Georgia, beginning at 10:00 o'clock a.m. on July 26,  
1960 and continuing through July 28, 1960.

It was stipulated by the parties that title to the several  
tracts at the time of the taking by the United States was  
vested in Hoke S. Lindsey.

Tract H805 is comprised of 963 acres as shown by the  
maps and plats placed in evidence and in addition some  
52 acres more or less situate between the west line of such  
tract along the east bank of the Chattahoochee River  
as shown on such maps and the west bank of the Chat-  
tahoochee River, the actual west property line of the Land

Owner; Tract H805E1 is a perpetual flowage easement over 2.10 acres; Tract H805E2 is a perpetual flowage easement over 3.40 acres; Tract H805E3 is a perpetual flowage easement over 3.40 acres; Tract H805E4 is a perpetual flowage easement over 1.80 acres. The date of taking of the land by the Government was May 15, 1959.

At the conclusion of the evidence the parties waived oral argument, and it was agreed that the Commission would take the matter under advisement, with either party being entitled to file written briefs and argument, the Commission to render its decision as to the amount of just compensation at a later date.

The hearing was attended by Miss Eunice Ward, special court reporter, and all of the testimony produced was taken down by her. A transcription of the proceedings will be available in the event desired. The documentary exhibits, maps, plats, photographs, etc., introduced into evidence have been placed in the custody of the Clerk.

In accordance with the prior order of this Court, the Commission makes the following summarization of evidence, findings of fact, conclusions of law, and award of just compensation.

#### **Summarization of Evidence.**

The Commission went upon and over the property on July 16, 1960. A representative from the Government was present, and together with the Land Owner, accompanied the Commission on the inspection. The improvements had been removed and none of the land was in cultivation with annual row crops. However, the general topography and

contour of the land, the character of the soil, lands theretofore devoted to row crops and the characteristics of the land were noted by the Commission. The Commission has given consideration to charts, maps, plats, photographs, etc., which were introduced into evidence by the parties.

(a) EVIDENCE FOR THE LAND OWNER.

1. Hoke S. Lindsey, the Land Owner, testified that he bought the land under deed dated January 1, 1945, and that the highest and best use of the land at the time of the taking was for row cropping, cattle farming and timber growing. He further testified as to the production record of the land and the fencing located thereon. He gave as his opinion value of the land taken on the date taken \$140.00 per acre. He testified that the taking left him with an over supply of farm buildings for the remainder and resulted in a substantial reduction in value of the acreage remaining. He testified that the taking took the "heart of the farm" and left him with a "limited water supply" leaving his adjacent lands reduced in value to \$75.00 per acre. He further testified that his home place, an 86 acre tract 4 miles east of subject tract was operated with subject tract "as a unit" and it was damaged by the taking in the amount of \$15,000.00. He had farmed the entire acreage with six tractors.

2. Lewis Moore, Jr., owner of other lands in the community, testified as to his familiarity with the subject tract and also other lands and land values in the community. He gave as his opinion the fair market value of the subject tract on the date of taking as \$120.00 to \$125.00

per acre and gave as his estimate of damage to the remainder from the taking \$45.00 per acre.

3. T. J. Crittenden, C.P.A., offered to testify as to the gross revenue received by Land Owner from farming operations, but this evidence was excluded on motion of the District Attorney.

4. H. P. Mason, farmer, testified as to his familiarity with the subject tract and farm lands and the value of farm lands in the vicinity. He gave as his opinion the fair market value of the property taken on the date taken as \$150.00 per acre and his opinion of the value of the remainder left from the taking as reduced from \$150.00 per acre to \$80.00 per acre.

5. B. C. Brumbelow, county agent, testified that he had known subject tract for some twenty years and knew its productivity. He also said he was familiar with lands and land values in the community. He gave as his opinion value of the subject tract on the date taken \$110.00 per acre.

6. T. W. Mobley, banker and farmer, testified that he sold subject property to the Land Owner, and farmed the property theretofore. He stated that he was familiar with this property and also farm lands generally and farm land values generally in the community. He gave as his opinion value of the subject tract on the date taken \$125.00 per acre.

7. W. O. Sellers, county agent, grantor in a sale of other property testified as to some details of that property and sale offered as a comparable sale.

8. M. J. Williamson, land appraiser and expert value witness, testified as to his examination and appraisal of subject tract and study of local market conditions. He testified that he evaluated the property primarily from the market data or comparable sales approach though he made reference to the revenue produced and as to improvements the cost approach. He stated that he considered the highest and best use of the property at the time taken to be general agriculture comprised of row crops, pasture and timber. He gave as his opinion of fair market values of the property on the date taken by the Government:

Entire tract	\$156,000.00
Remainder after taking	42,000.00

Difference between before and after taking \$114,000.00

He testified that in computing severance damage he considered the home place as a part of the farm unit and attributed severance damage as follows:

Home place valued before taking at	\$ 34,600.00
valued after taking at	20,400.00
Entire River tract valued before taking at	121,400.00
Remainder valued after taking at	21,600.00
In other computation he evaluated	
Improvements on property taken	225.00
Value of land taken in fee	87,140.00
Severance damages (including easements)	26,635.00
Total	\$114,000.00

(b) EVIDENCE FOR THE GOVERNMENT.

1. Thos. H. Hall, real estate appraiser and expert value witness, testified as to his inspection and appraisal of sub-

ject tract including soils. He further testified concerning his study of market conditions in the community and gave details concerning five land sales of other properties offered as comparable sales. He identified various exhibits including photographs, maps, plats, and chart of the comparable sales. He stated that the highest and best use of the property at the time taken was row cropping, pasture and timber. He gave as his opinion of fair market values of the property on the date taken by the Government:

Entire tract	\$104,625.00
Remainder after taking	47,825.00
Property taken	\$ 56,800.00
Plus Severance Damages of	1,825.00
Total	\$ 58,625.00

In computing severance damages he made no allowance for severance damage to the 86 acre home place located some four miles away. He did allow \$960.00 for fencing along the line of taking and \$540.00 for needed road construction. His computation included an allowance of \$104.35 for the easements, which amount was included in the \$56,800.00 figure for property taken.

(c) REBUTTAL EVIDENCE FOR LAND OWNER.

1. F. C. Clapp, county agent, testified as to familiarity with subject tract and the nature of the soils thereon. He testified that he was also familiar with those lands sales of which had been offered by the Government as comparable sales. He testified as to some similarities and some marked dissimilarities of these tracts when compared with the subject tract.

2. Miss Janice Lindsey testified that there were 592.5 acres of open land on the subject tract.

3. Land Owner, recalled, testified he had lost no crops from excessive wetness. He further estimated cost of fencing at \$100.00 to \$150.00 per mile.

Thereupon the evidence was closed.

### Findings of Fact.

The Commission finds from the evidence as a whole the following:

1. Hoke S. Lindsey, according to the stipulation of the parties, was the owner of the several tracts herein described at the time of the taking by the United States on May 15, 1959.

2. The highest and best use to which these tracts could have been put at the time taken by the Government was that of agriculture comprised of row crops, pasture and timber.

3. The Commission finds as a matter of fact that no severance damages are allowable as to the 86 acre home place located some four miles from the property taken.

4. The property remaining in the river tract after the taking was comprised of some 502.10 acres out of a theretofore total acreage in one body of some 1527 acres more or less, and the highest and best use of the remaining acreage after the taking was pasturage and timber growing. Furthermore, the improvements located on this remainder constructed to serve the larger acreage left the remainder "over-improved." As a consequence of all of which the Com-

mission finds the owner is entitled to severance damages in the amount of \$15,785.00.

5. The Commission finds that the fair market value of the fee in Tract H805, including the land lying between the banks of the river, was \$96,300.00 when it was taken by the United States on May 15, 1959.

6. The Commission finds that the fair market value of the easement over Tract H805E1 was \$100.00 when it was taken by the United States on May 15, 1959.

7. The Commission finds that the fair market value of the easement over Tract H805E2 was \$170.00 when it was taken by the United States on May 15, 1959.

8. The Commission finds that the fair market value of the easement over Tract H805E3 was \$170.00 when it was taken by the United States on May 15, 1959.

9. The Commission finds that the fair market value of the easement over Tract H805E4 was \$90.00 when it was taken by the United States on May 15, 1959.

10. Hoke S. Lindsey is entitled to an award and judgment against the United States for the taking of the property in question in the amount of \$112,615.00, together with interest on that part of the amount so awarded which is in excess of the deposit made by the United States at the rate of 6% per annum in accordance with the law.

#### **Conclusions of Law.**

1. The United States had the right, in the exercise of its power of eminent domain, to take all of the property of Hoke S. Lindsey involved in these proceedings.

2. Hoke S. Lindsey is entitled to just compensation for the taking thereof, which compensation must represent the fair market value of all of the property taken as of the date it was taken by the United States.

3. Hoke S. Lindsey is further entitled to severance damages as a part of just compensation.

4. The entire body of these several tracts of land involved in this proceeding is situated in Clay and Quitman Counties, Georgia, within the Columbus Division of the United States District Court for the Middle District of Georgia; and, accordingly, the Commission, as constituted by this Court in its order entered in these proceedings on December 22, 1959, has jurisdiction for the purpose of determining the amount of just compensation to be paid by the United States for the taking of such land.

Wherefore, the undersigned Commissioners recommend to the Court that judgment be entered herein awarding just compensation to Hoke S. Lindsey as the owner of the lands condemned in the amount and in the manner hereinabove specified.

Respectfully submitted this August 19, 1960.

/s/ Mallory C. Atkinson  
Mallory C. Atkinson,  
Chairman

/s/ J. P. Champion  
J. P. Champion

/s/ Hines Preston  
Hines Preston

Commissioners

Copies mailed to parties by Judge Atkinson on 8/19/60.

/s/ John P. Cowart  
Clerk

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

United States of America,

vs.

2,872.88 acres of land more or less,  
situated in Clay and Quitman  
Counties, State of Georgia, and  
Frank Humber et al. and un-  
known owners.

Civil Action  
No. 789  
Tracts No. M 1306  
and M 1306E

**REPORT OF COMMISSIONERS.**

(Filed August 19, 1960. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

To the Honorable W. A. Bootle, United States Judge for  
the Middle District of Georgia.

Pursuant to notice given to all parties concerned, the  
evidentiary hearing on condemnation of the above listed  
tracts was held in the United States Court Room in Colum-  
bus, Georgia, beginning at 9:30 o'clock A. M. on August  
3, 1960 and continuing through August 4, 1960.

The owner of the two tracts listed at the time of the  
taking by the United States, according to the stipulation  
of the parties, was A. J. Watson.

Tract M 1306 represents the fee in 330 acres of land  
and Tract M 1306E is a perpetual flowage easement over  
7.58 acres. The date of the taking of the land by the  
United States was May 15, 1959.

It was further stipulated that the value of the timber  
on the land taken at the time taken was \$1,082.00.

At the conclusion of the evidence, oral argument was waived and it was agreed that the Commission would take the matter under advisement, with counsel for either party being entitled to file written briefs and argument, the Commission to render its decision as to the amount of just compensation at a later date.

The hearing was attended by Mr. Claude Joiner, Jr., official court reporter, and all of the testimony produced was taken down by him. A transcription of the proceedings will be available in the event desired. All documentary evidence, maps, plats, charts, photographs and the like have been placed in the custody of the Clerk.

In accordance with the prior order of this Court, the Commission makes the following summarization of evidence, findings of fact, conclusions of law, and award of just compensation.

#### **Summarization of Evidence.**

The Commission went upon and over the property on July 25, 1960. A representative of the Government was present and, together with Mr. A. J. Watson, the Land Owner, accompanied the Commissioners on this inspection. At the time of the inspection no substantial improvements remained on the property and none of the property was in cultivation with annual row crops. However, the general topography and contour of the land, the character of the soil, lands theretofore devoted to row crops and other characteristics of the land were noted by the Commission. The Commission has given consideration to charts, maps, plats, photographs, etc., which were introduced into evidence by the parties.

(a) EVIDENCE FOR THE LAND OWNER.

1. It was stipulated that the testimony of Raymond Smith as to the cost of fencing as given in connection with the evidentiary hearing on Tract M 1301, Gary, might be considered by the Commission. He had testified to estimated cost of fencing as 1240 hog wire with 1 strand barbed wire \$1,094.00 per mile and 1240 hog wire with 2 strands barbed wire \$1,128.00 per mile both figures to be applied as to cleared land.

2. Joe J. Hurst testified as to his evaluation of a part of subject tract on the basis of use as a subdivision for home sites. A proposed plat of such subdivision was offered and excluded from evidence on the motion of the District Attorney on the ground that the plat was not sufficiently authenticated and no market was shown to exist for any such subdivision lots to make the evidence acceptable as relevant to a determination of fair market value.

M. J. Williamson, real estate appraiser and expert value witness, testified as to his inspection and appraisal of the subject tract and his study of the local market conditions as to farm properties. He testified that he found no sales of other tracts which in his judgment served as sufficiently comparable to the subject tract to serve as a basis for valuation on the market or comparable approach. He based his opinion on his study of the subject tract including its productivity and rental value and his experience in this and other areas. He defined the highest and best use of subject tract as agriculture, testified in some detail as to his evaluation of improvements and gave the land uses as follows: entire tract before taking 72.25% open

land and 26.5% woodland; land taken 75% open and 22.72% woodland; land remaining after taking 55.55% open and 44.45% woodland. He gave as his opinion the fair market value of the subject tract on the date of taking as follows:

Entire Tract	\$52,500.00
Remainder after taking	2,400.00
Total amount of claim	<u>\$50,100.00</u>

In a recomputation of the amount recoverable he testified to values as follows:

Value of land taken in fee	\$36,125.00
Value of contribution of improvements	12,700.00
Severance damage including easements	<u>1,275.00</u>
Total amount of claim	<u>\$50,100.00</u>

4. Joe Gary testified that he measured the fencing on the taken area and found 4.036 miles of hog wire with 2 strands barbed wire 1.667 miles of hog wire with 1 strand barbed wire .668 miles of 3 strands barbed wire and .1 miles of 4 strands barbed wire. He stated the line between property taken and remainder would call for 3400 ft. of fencing. On cross-examination he testified that of these fences some 3 miles constituted boundary fences.

5. J. R. Ogletree, sheriff, testified as to his familiarity with subject tract having owned the adjacent tract, and his familiarity with farm lands and farm land fair market values in the community. He gave as his opinion the fair market value of the land taken on the date taken as \$200.00 per acre. On cross-examination he testified that he did not know the highest and best use of the land taken when taken.

6. A. J. Watson, the Land Owner, testified in some detail as to fencing, gates, cattle gaps, improvements on the property, its proximity to Georgetown, the dwelling house, availability of electricity, absence of erosion, level character of land with no terraces and the production record of the farm operations. He stated that he was familiar with farm lands and farm land fair market values in the community. He gave as his opinion the fair market value of the subject tract on the date taken as follows:

Entire Tract	\$96,000.00
Remainder after taking	2,800.00
Amount of claim	<hr/> \$93,200.00

He testified that since the taking he had built a new access road to the remainder at a cost of \$500.00, and placed a valuation on improvements of \$34,430.00.

7. Murray Heath, production credit association manager, testified as to his familiarity with the subject tract and his familiarity with farm lands and farm land fair market values in the community. He gave as his opinion the fair market value of the land taken on the date taken as \$66,000.00.

(b) EVIDENCE FOR THE GOVERNMENT.

1. T. H. Hall, real estate appraiser and expert value witness, testified as to his inspection and appraisal of the subject tract, including discussion with Land Owner, consideration of improvements, production records and nature and usage of premises. He fixed the highest and best use of the entire tract on the date of taking as row cropping, pasture and timber, and of the remainder after taking as

timber. He testified as to his study of the local market conditions and placed his primary reliance on the market data or comparable approach, stating that inadequacy of records would preclude reliability of the income approach. He identified maps, plats, chart and photographs introduced by the Government and gave details of four transactions relied upon as comparable sales. He gave as his opinion of the fair market value of the subject tract on the date of taking the following:

Entire tract	\$37,700.00
Remainder after taking	2,650.00
Amount of claim	<u>\$35,050.00</u>

A recomputation of these figures he testified showed such values as:

Property taken (fee and easement)	\$34,825.00
Severance damage	225.00
Amount of claim	<u>\$35,050.00</u>

2. C. W. McKinnon, real estate appraiser and expert value witness testified as to his inspection and appraisal of the subject tract, his study of the local market and farm properties and farm fair market values. He gave details of a sales transaction of other property offered as a comparable sale. He fixed the highest and best use of the entire tract on the date of taking as general farming, and of the remainder after taking as woodland. He gave as his opinion of the fair market value of the subject tract on the date of taking the following:

Entire tract	\$35,000.00
Remainder after taking	1,660.00
Amount of Claim	<u>\$33,340.00</u>

He testified that these figures included allowance of \$94.00 for the easement and \$250.00 as severance damages.

(c) **REBUTTAL EVIDENCE FOR THE LAND OWNER.**

1. A. J. Watson, the Landowner, recalled testified as to the location of hog wire fencing on the property.

2. Linwood Watson testified as to his familiarity with the tract involved in the first of the comparable sales offered by the Government and pointed out distinctions and differences between that tract and the subject tract.

Thereupon the evidence was closed.

**Findings of Fact.**

The Commission finds from the evidence as a whole the following:

1. A. J. Watson, in accordance with the stipulation of the parties was the owner of the two tracts herein described at the time of the taking by the United States on May 15, 1959.

2. The highest and best use to which the entire tract could have been put at the time of the taking by the Government was general agriculture consisting of row crops, pasturage, and timber. The highest and best use to which the remainder after the taking could have been put at the time of the taking was timber growing.

3. The tract remaining after the taking is made up of 62.42 acres out of the theretofore existent tract of 400 acres all in one body. The value of the remaining acreage for agricultural purposes has been reduced and accessibility impaired. As a consequence the Commission finds that A. J. Watson is entitled to severance damages in the amount of \$3,500.00.

4. The Commission finds that the fair market value of the fee in Tract M 1306 was \$52,950.00 when it was taken by the United States on May 15, 1959.

5. The Commission finds that the fair market value of the easement over Tract M 1306E was \$240.00 when it was taken by the United States on May 15, 1959.

6. A. J. Watson is entitled to an award and judgment against the United States for the taking of the property in question in the amount of \$56,690.00, together with interest on that part of the amount so awarded which is in excess of the deposit made by the United States at the rate of 6% per annum in accordance with the law.

#### Conclusions of Law.

1. The United States had the right, in the exercise of its power of eminent domain, to take all of the property of A. J. Watson involved in these proceedings.

2. A. J. Watson as owner of these tracts of land is entitled to just compensation for the taking thereof, which compensation must represent the fair market value of all of the property taken by the United States.

3. A. J. Watson as owner of these tracts of land is further entitled to severance damages arising out of the taking as a part of such just compensation.

4. The entire body of these tracts of land involved in this proceeding is situated in Quitman County, Georgia, within the Columbus Division of the United States District Court for the Middle District of Georgia; and accordingly, the Commission as constituted by the Court in its order entered in these proceedings on December 22, 1959, has jurisdiction for the purpose of determining the amount of just compensation to be paid by the United States for the taking of such land.

Wherefore, the undersigned Commissioners recommend to the Court that judgment be entered herein awarding just compensation to A. J. Watson as the owner of the lands condemned in the amount and in the manner hereinabove specified.

Respectfully submitted this August 19, 1960.

/s/ Mallory C. Atkinson,  
Mallory C. Atkinson,  
Chairman,

/s/ J. P. Champion,  
J. P. Champion,

/s/ Hines Preston,  
Hines Preston,  
Commissioners.

Copies mailed by Judge Atkinson to parties on 8/19/60.

/s/ John P. Cowart,  
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER ET AL. AND  
UNKNOWN OWNERS,

Defendants.

CIVIL ACTION

No. 789

TRACTS Nos.

H-805,

H-805-E-1,

H-805-E-2,

H-805-E-3,

and H-805-E-4.

**OBJECTIONS TO REPORT OF COMMISSIONERS.**

(Filed August 29, 1960. Jennie L. Stricklin, Deputy  
Clerk, United States District Court.)

The United States of America, plaintiff in the above  
entitled cause, objects to the Report of Commissioners  
filed in this cause on August 19, 1960, on the following  
grounds:

1. The Report does not contain sufficient specific  
findings as to the matters on which the Commissioners  
based their valuation.

2. The Report does not sufficiently set forth the  
principles of law which the Commissioners applied in ar-  
riving at their conclusion as to value.

3. The award is excessive, outside the range of any  
proper testimony, against the weight of the evidence and  
clearly shows that the Commissioners disregarded recent  
sales of similar properties.

4. The award is outside the range of market value and therefore, clearly erroneous.

5. The Commissioners erred in failing to exclude the testimony of the landowner whose measure of value was founded primarily on an income approach and it is impossible to determine to what extent, if any, this testimony entered into the Commissioners valuation.

Wherefore, plaintiff moves that the Court reject the Report and the findings and conclusions of the Commissioners and make an independent valuation of its own to conform with the clear weight of the evidence as to fair market value or in the alternative remand to the Commissioners for (1) a re-determination of the issue of just compensation in the terms of fair market value with appropriate additional instructions as to the use of comparable sales, the weight to be accorded a view of the premises, the irrelevancy of consequential damages and as to the guide of the recent sales of similar properties when fair market value can be thus ascertained, and (2) proper findings as to the basic facts together with the principles of law which were applied in arriving at conclusion of value.

Respectfully submitted,

/s/ Truett Smith,  
Truett Smith,

Assistant United States  
Attorney.

Address:

P. O. Box 118,  
Macon, Georgia.

**Certificate of Mailing.**

I, Truett Smith, Assistant United States Attorney, hereby certify that on this 26th day of August, 1960, I, mailed a copy of the foregoing objections to the attorneys for Hoke S. Lindsey, Mr. Jesse G. Bowles, Cuthbert, Georgia, and Mr. Forrest L. Champion, Jr., P. O. Box 196, Columbus, Georgia, by depositing the same in the United States mail in a franked envelope addressed as above set out.

/s/ Truett Smith,  
Truett Smith,  
Assistant United States  
Attorney.

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER ET AL. AND  
UNKNOWN OWNERS.**

**CIVIL ACTION**

**No: 789**

**Tracts Nos. M 1306  
and M 1306E.**

**OBJECTIONS TO REPORT OF COMMISSIONERS.**

(Filed August 29, 1960. Jennie L. Stricklin, Deputy  
Clerk, United States District Court.)

The United States of America, plaintiff in the above-entitled cause, objects to the Report of Commissioners filed in this cause on August 19, 1960, on the following grounds:

1. The Report does not contain sufficient specific findings as to the matters on which the Commissioners based their valuation.

2. The Report does not sufficiently set forth the principles of law which the Commissioners applied in arriving at their conclusion as to value.

3. The award is excessive, outside the range of any proper testimony, against the weight of the evidence and clearly shows that the Commissioners disregarded recent sales of similar properties.

4. The award is outside the range of market value and therefore clearly erroneous.

5. The Commissioners erred in failing to exclude the testimony of the landowner's witness, M. J. Williamson, whose measure of value was founded in part on capitalization of income approach and whose measure of value did not meet the legal criteria for determining fair market value and it is impossible to determine to what extent, if any, this testimony entered into the Commissioners' valuation.

Wherefore, plaintiff moves that the Court reject the Report and the findings and conclusions of the Commissioners and make an independent valuation of its own to conform with the clear weight of the evidence as to fair market value or in the alternative remand to the Commissioners for (1) a re-determination of the issue of just compensation in the terms of fair market value with appropriate additional instructions as to the use of comparable sales, the weight to be accorded a view of the

premises, the irrelevancy of consequential damages and as to the guide of the recent sales of similar properties when fair market value can be thus ascertained, and (2) proper findings as to the basic facts together with the principles of law which were applied in arriving at conclusion of value.

Respectfully submitted,

/s/ Truett Smith,  
Truett Smith,  
Assistant United States  
Attorney.

Address:

P. O. Box 118,  
Macon, Georgia.

**Certificate of Mailing.**

I, Truett Smith, Assistant United States Attorney, hereby certify that on this 26th day of August, 1960, I mailed a copy of the foregoing objections to the attorneys for A. J. Watson, Mr. Jesse G. Bowles, Cuthbert, Georgia, and Mr. Forrest L. Champion, Jr., P. O. Box 196, Columbus, Georgia, by depositing the same in the United States Mail in a franked envelope addressed as above set out.

/s/ Truett Smith,  
Truett Smith,  
Assistant United States  
Attorney.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

CIVIL ACTION

No. 789

TRACTS Nos. H-  
805, H-805-E-1, H-  
805-E-2, H-805-E-3  
and H-805-E-4

**ORDER ADOPTING REPORT OF COMMISSIONERS.**

(Filed February 13, 1961. John P. Cowart, Clerk,  
United States District Court.)

The Commissioners having filed their report fixing just compensation, condemnor having filed objections to said report, both sides having filed briefs in support of, or in opposition thereto, and said report, objections and briefs having been carefully considered,

The said report of the Commissioners is hereby approved and adopted by the court.

Let counsel for condemnor prepare and submit an appropriate judgment.

SO ORDERED, this 10 day of February, 1961.

/s/ W. A. Bootle,

United States District Judge.

This is to certify that I have this day mailed a copy of the above to Mr. Jesse G. Bowles, Atty., Cuthbert, Ga.; Mr. Forrest L. Champion, Atty., Columbus, Ga.; Foley, Chappell, Young & Hollis, Attys., Columbus, Ga., and to

Mr. Truett Smith, Asst. U. S. Atty., Macon, Ga. This  
Feb. 13, 1961.

/s/ John P. Cowart,  
Clerk.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA

v.  
2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

CIVIL ACTION  
No. 789  
TRACTS Nos. M-  
1306 and M-1306-E

**ORDER ADOPTING REPORT OF COMMISSIONERS.**

(Filed February 13-1961. John P. Cowart, Clerk,  
United States District Court.)

The Commissioners having filed their report fixing  
just compensation, condemnor having filed objections to  
said report, both sides having filed briefs in support of or  
in opposition thereto, and said report, objections and briefs  
having been carefully considered,

The said report of the Commissioners is hereby ap-  
proved and adopted by the court.

Let counsel for condemnor prepare and submit an ap-  
propriate judgment.

SO ORDERED, this 10 day of February, 1961.

/s/ W. A. Bootle,

United States District Judge.

This is to certify that I have this day mailed a copy of the above to Mr. Truett Smith, Asst. U.S. Atty.; Mr. Jesse G. Bowles, Atty, Cuthbert, Ga.; Mr. Forrest L. Champion, Atty, Columbus, Ga.; and to Foley, Chappell, Young & Hollis, Attys., Columbus, Ga. This Feb. 13, 1961.

/s/ John P. Cowart,  
Clerk.

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

**UNITED STATES OF AMERICA,**  
Plaintiff,

v.

**2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS**

Defendants.

**CIVIL No. 789  
TRACTS Nos. H-  
805, H-805-E-1, H-  
805-E-2, H-805-E-3  
and H-805-E-4**

**JUDGMENT.**

(Filed April 25, 1961. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

That an order heretofore entered adopted and confirmed the Commissioners' Report on Tracts Nos. H-805, H-805-E-1, H-805-E-2, H-805-E-3 and H-805-E-4 finding the just compensation for the taking of the property being acquired herein as Tracts Nos. H-805, H-805-E-1, H-805-E-2, H-805-E-3 and H-805-E-4 to have been the sum of \$112,615.00 at the time of the taking thereof by the United States of America, IT IS ADJUDGED, ORDERED AND

DECREED that Hoke S. Lindsey do have and recover of and from the United States of America the amount of just compensation of \$112,615.00.

It appearing to the Court:

That from Certificates of the Tax Collectors of Quitman and Clay Counties, Georgia, exhibited to the Court by the United States Attorney, that there are no taxes due on these tracts, and

That the United States of America has the right to condemn the subject property interests for public use, and

That the estate or interest condemned and the legal description of the subject property are both defined by the Petition in Condemnation and the Declaration of Taking filed herein, and title to said estate or interest in said subject property is vested in the United States, and

That the United States of America deposited in the Registry of this Court on May 15, 1959, at the time of filing its Declaration of Taking in this proceeding, the sum of \$54,905.00, as the estimated compensation for said property interests, and that the difference between the amount of the deposit of estimated compensation, as aforesaid, and the value of said property interests, as aforesaid, is the sum of \$57,710.00, and

That an order heretofore entered found that the United States of America was entitled to a reasonable rental of \$1,892.72 arising under a claim for reasonable rental filed against the former landowner on February 10, 1961.

Therefore, IT IS ORDERED:

That judgment be, and the same hereby is, rendered against the United States of America and in favor of Hoke

S. Lindsey in the sum of \$55,817.28 (representing the difference between \$57,710.00 and \$1,892.72), together with interest on \$57,710.00 from May 15, 1959, until February 10, 1961 (representing the date the United States of America filed its claim for reasonable rental), at the rate of six percent per annum, also together with interest on \$55,817.28 at the rate of six percent per annum from February 10, 1961, until payment into the Registry of this Court.

This cause is held open for such further orders, judgments and decrees as may be necessary in the premises.

This 24 day of April, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith,  
Truett Smith,

Assistant United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

Defendants.

CIVIL No. 789  
TRACTS Nos. M-  
1306 and M-1306-E

**JUDGMENT.**

(Filed April 25, 1961. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

That an order heretofore entered adopted and confirmed the Commissioners' Report on Tracts Nos. M-1306 and M-1306-E finding the just compensation for the taking of the property being acquired herein as Tracts Nos. M-1306 and M-1306-E to have been the sum of \$56,690.00 at the time of the taking thereof by the United States of America, IT IS ADJUDGED, ORDERED AND DECREED that A. J. Watson do have and recover of and from the United States of America the amount of just compensation of \$56,690.00.

It appearing to the Court:

That from Certificates of the Tax Collectors of Quitman County, Georgia, and Georgetown, Georgia, exhibited to the Court by the United States Attorney, that there are no taxes due on these tracts, and

That the United States of America has the right to condemn the subject property interests for public use, and

That the estate or interest condemned and the legal description of the subject property are both defined by the Petition in Condemnation and the Declaration of Taking filed herein, and title to said estate or interest in said subject property is vested in the United States, and

That the United States of America deposited in the Registry of this Court on May 15, 1959, at the time of filing its Declaration of Taking in this proceeding, the sum of \$39,135.00, as the estimated compensation for said property interests, and that the difference between the amount of the deposit of estimated compensation, as aforesaid, and the value of said property interests, as aforesaid, is the sum of \$17,555.00, and

That an order heretofore entered found that the United States of America was entitled to a reasonable rental of \$1,316.00 arising under a claim for reasonable rental filed against the former landowner on February 10, 1961.

Therefore, IT IS ORDERED:

That judgment be, and the same hereby is, rendered against the United States of America and in favor of A. J. Watson in the sum of \$16,239.00 (representing the difference between \$17,555.00 and \$1,316.00), together with interest on \$17,555.00 from May 15, 1959, until February 10, 1961 (representing the date the United States of America filed its claim for reasonable rental), at the rate of six percent per annum, also together with interest on \$16,239.00 at the rate of six percent per annum from February 10, 1961, until payment into the Registry of this Court.

This cause is held open for such further orders, judgments and decrees as may be necessary in the premises.

This 24 day of April, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith,

Truett Smith, Jr.

Assistant United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA

Plaintiff

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

Defendants

CIVIL No. 789  
TRACTS Nos. H-  
805, H-805-E-1, H-  
805-E-2, H-805-E-3  
and H-805-E-4

NOTICE OF APPEAL.

(Filed June 22, 1961. H. Okay Parker, Deputy Clerk,  
United States District Court.)

Comes now Floyd M. Buford, United States Attorney,  
and Truett Smith, Assistant United States Attorney, counsel  
for appellant, the United States of America, and hereby  
gives notice of appeal to the United States Court of Ap-

peals for the Fifth Circuit from the final judgment entered in this cause on April 25, 1961.

Floyd M. Buford,  
United States Attorney,

By: /s/ Truett Smith,  
Truett Smith  
Assistant United States Attorney.

Address:

P. O. Box 118,  
Macon, Georgia.

**Certificate of Service.**

I hereby certify that a true and exact copy of the above and foregoing Notice of Appeal has been served on Jesse G. Bowles, Cuthbert, Georgia; Kelly, Champion & Henson, Columbus Bank and Trust Company Building, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for Hoke S. Lindsey, former owner, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 21st day of June, 1961.

/s/ Truett Smith,  
Truett Smith,  
Assistant United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA  
Plaintiff

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

Defendants

CIVIL No. 789  
TRACTS Nos. M-  
1306 and M-1306-E

**NOTICE OF APPEAL.**

(Filed June 22, 1961. H. Okay Parker, Deputy Clerk,  
United States District Court.)

Comes now Floyd M. Buford, United States Attorney,  
and Truett Smith, Assistant United States Attorney, coun-  
sel for appellant, the United States of America, and hereby  
gives notice of appeal to the United States Court of Ap-  
peals for the Fifth Circuit from the final judgment en-  
tered in this cause on April 25, 1961.

Floyd M. Buford,  
United States Attorney,

By: /s/ Truett Smith,  
Truett Smith

Assistant United States Attorney.

Address:

P. O. Box 118,  
Macon, Georgia.

**Certificate of Service.**

I hereby certify that a true and exact copy of the above and foregoing Notice of Appeal has been served on Jesse G. Bowles, Cuthbert, Georgia; Kelly, Champion & Henson, Columbus Bank and Trust Company Building, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for A. J. Watson, former owner, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 21st day of June, 1961.

/s/ Truett Smith,  
Truett Smith,

Assistant United States Attorney.

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

**UNITED STATES OF AMERICA**  
Plaintiff

v.

**2,872.38 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS**

Defendants

**CIVIL No. 789 •  
TRACTS Nos. H-  
805, H-805-E-1, H-  
805-E-2, H-805-E-3  
and H-805-E-4**

**ORDER TRANSMITTING ORIGINAL PAPERS  
AND EXHIBITS.**

(Filed November 3, 1961. John P. Cowart, Clerk,  
United States District Court.)

It appearing to the Court that the original papers and exhibits, comprising the entire record of the above-entitled

case, should be sent to the United States Court of Appeals for the Fifth Circuit in lieu of copies,

It is therefore ORDERED pursuant to Rule 75(i), F.R. Civ. P., that the Clerk of this Court is to transmit, in physical form and without copying, to the Clerk of the United States Court of Appeals for the Fifth Circuit, the original papers and exhibits comprising the entire record in this case, and

It is further ORDERED that the original papers and exhibits shall be received by the Clerk of the Court of Appeals and held by him during the pending of the appeal herein for the use of the Court and counsel, and

It is further ORDERED that after the termination of the proceedings on appeal the Clerk of the Court of Appeals shall return the original papers and exhibits to the Clerk of this Court.

This 3 day of November, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith,  
Truett Smith,

Assistant United States Attorney.

**Certificate of Service.**

I hereby certify that a true and exact copy of the above and foregoing Order Transmitting Original Papers and Exhibits has been served on Jesse G. Bowles, Cuthbert, Georgia; Kelly, Champion & Henson, Columbus Bank and Trust Company Building, Columbus, Georgia; Frank

D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for Hoke S. Lindsey, former owner, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 3 DAY OF NOVEMBER, 1961.

/s/ Truett Smith,  
Truett Smith,

Assistant United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA  
Plaintiff

v.

2,872.88 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES,  
STATE OF GEORGIA, AND  
FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS

Defendants

CIVIL No. 789  
TRACTS Nos. M-  
1306 and M-1306-E

**ORDER TRANSMITTING ORIGINAL PAPERS  
AND EXHIBITS.**

(Filed November 3, 1961. John P. Cowart, Clerk,  
United States District Court.)

It appearing to the Court that the original papers and exhibits, comprising the entire record of the above-entitled case, should be sent to the United States Court of Appeals for the Fifth Circuit in lieu of copies,

It is therefore ORDERED pursuant to Rule 75(i), F.R. Civ. P., that the Clerk of this Court is to transmit, in physi-

cal form and without copying, to the Clerk of the United States Court of Appeals for the Fifth Circuit, the original papers and exhibits comprising the entire record in this case, and

It is further ORDERED that the original papers and exhibits shall be received by the Clerk of the Court of Appeals and held by him during the pending of the appeal herein for the use of the Court and counsel, and

It is further ORDERED that after the termination of the proceedings on appeal the Clerk of the Court of Appeals shall return the original papers and exhibits to the Clerk of this Court.

This 3 day of November, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith,

Truett Smith,

Assistant United States Attorney.

#### Certificate of Service.

I hereby certify that a true and exact copy of the above and foregoing Order Transmitting Original Papers and Exhibits has been served on Jesse G. Bowles, Cuthbert, Georgia; Kelly, Champion & Henson, Columbus Bank and Trust Company Building, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for A. J. Watson, former owner, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 3 day of November, 1961.

(s/ Truett Smith;  
Truett Smith,

Assistant United States Attorney.

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff**

**v.**

**1,361.09 ACRES OF LAND, MORE  
OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA,  
AND CAROLYN GAVIN GIBSON,  
ET AL., AND UNKNOWN OWN-  
ERS,**

**Defendants**

**CIVIL No. 792**

**COMPLAINT IN CONDEMNATION.**

(Filed June 23, 1959. John P. Cowart, Clerk,  
United States District Court.)

**1.**

This is an action of a civil nature brought by the United States of America at the request of the Secretary of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

**2.**

The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supple-

mentary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), which act authorizes the acquisition of land for river and harbor purposes; the Act of Congress approved July 24, 1946 (Public Law 525, 79th Congress), which act authorizes the construction of the Fort Gaines Lock and Dam, which said lock and dam, by Public Law 85-363, approved March 28, 1958, has been redesignated the Walter F. George Lock and Dam; and the Act of Congress approved September 2, 1958 (Public Law 85-863), which act appropriated funds for such purposes.

## 3.

The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the construction, repair and preservation of certain public works of rivers, harbors and waterways, and for other uses incident thereto. The said land has been selected by Wilber M. Brucker, Secretary of the Army of the United States for acquisition by the United States for use in connection with the establishment of the Walter F. George Lock and Dam Project, Georgia and Alabama, and for such other uses as may be authorized by Congress or by Executive Order.

## 4.

The interests in the property to be acquired are as follows:

- (a) The fee simple title to Tracts B-201 and B-240, together with all right, title or interest in and to the banks,

beds and waters of any streams opposite to or fronting upon said Tract B-201, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

(b) The perpetual right, power, privilege, and easement occasionally to overflow, flood, and submerge Tracts B-201-E-1, B-201-E-2, B-201-E-3, B-201-E-4, and B-240-E-1, and to maintain mosquito control, in connection with the operation and maintenance of the Walter F. George Lock and Dam Project as authorized by the Act of Congress approved July 24, 1946 (Public Law 525, 79th Congress), together with all right, title and interest in and to the structures and improvements now situated on the land; provided that no structures for human habitation shall be constructed or maintained on the land, and provided further that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the project; reserving, however, to the landowners, their heirs, and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

(c) A perpetual and assignable easement and right of way in, on, over and across Tracts B-201-E-5, B-201-E-6, B-201-E-7, and B-240-E-2, for the location, construction, operation, maintenance, replacement and/or removal of roads and highways and electric transmission lines and telephone lines and appurtenances thereto; together with

the right to trim, cut, fell and remove underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right of way; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

(d) A perpetual and assignable easement and right of way to locate, construct, operate, maintain, and repair a roadway, in, upon, over and across Tract B-201-E-8, together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right of way: subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs, executors, administrators, and assigns the right to use the surface of said land as access to their adjoining land.

(e) A perpetual and assignable easement and right of way in, over and across Tract B-240-E-3, to construct, maintain, repair, operate, patrol and replace a drainage ditch, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

## 5.

The property so to be taken is described in Schedule A hereto attached. The property which is the subject matter of this proceeding is located in Clay County, Georgia.

## 6.

The persons having or claiming an interest in the property, including taxing authorities, whose names are now known are:

## AS TO ALL TRACTS

The Governor of Georgia	Atlanta, Georgia
The Secretary of State	Atlanta, Georgia
The Attorney General of Georgia	Atlanta, Georgia
State Highway Board	Atlanta, Georgia
County Commissioners of Clay County	Fort Gaines, Georgia
The Ordinary of Clay County, Ga., or the Clerk of the Superior Court of said county, if the Ordinary be disqualified, pursuant to Section 36-310 of the Code of Georgia of 1933	Fort Gaines, Georgia
Board of County Tax Assessors, Clay County, Georgia	Fort Gaines, Georgia
Tax Commissioners, Clay County, Georgia	Fort Gaines, Georgia

## AS TO TRACTS B-201,

B-201-E-1, B-201-E-2,

B-201-E-3, B-201-E-4,

B-201-E-5, B-201-E-6,

B-201-E-7, B-201-E-8.

Carolyn Gavin Gibson	Fort Gaines, Georgia
Edward M. Gavin	1609 Standford Ave., N. E. Albuquerque, New Mexico
James F. Gavin	4133 Richmond Avenue Shreveport, Louisiana
Chester Gavin, Jr.	8468 Denton Street La Mesa, California

H. G. King

J. P. Calhoun

B. F. Johnston

L. M. Ray

John R. Bell

Willie Williams

Charlie James

Ralph Crozier

Fort Gaines, Georgia  
c/o Calhoun Sand & Gravel  
Co.

Lumpkin Road,  
Columbus, Georgia  
Aliceville, Alabama

Fort Gaines, Georgia

Route #2, Box 25  
Fort Gaines, Georgia

Route #2, Box 214  
Fort Gaines, Georgia

Route #2  
Fort Gaines, Georgia

Route #2  
Fort Gaines, Georgia

All the parties in possession of the lands herein sought to be condemned whose identities and addresses are unknown.

7.

In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are not known to the plaintiff and such persons are made parties to this action under the designation "Unknown Owners".

8.

It is necessary to have appointed a guardian ad litem to act for the allegedly incompetent, Mose Wallace.

Wherefore, the plaintiff prays (1) judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper, and (2) that an ap-

propriate order of the Court be entered for the services of a guardian ad litem for Mose Wallace.

Frank O. Evans,

United States Attorney,

By /s/ Truett Smith,

Truett Smith,

Assistant United States Attorney.

Address:

P. O. Box 118,  
Macon, Georgia.

### DEMAND FOR JURY.

Trial by jury of the issue of just compensation is demanded by plaintiff this June 23, 1959.

/s/ Truett Smith,

Truett Smith,

Assistant United States  
Attorney.

TRACT B-201

CAROLYN GAVIN GIBSON, ET AL.

.1331.37 ACRES

WALTER F. GEORGE LOCK AND DAM

### SCHEDULE "A"

TRACT B-201

All that tract or parcel of land lying and being in Land Lots 268, 293, 294, 295, 306, 307, 334, 335, and Fractional Land Lots 343 and 372, Seventh Land District, Clay County, Georgia, being more, particularly described as follows:

Beginning at the Southeast corner of said Land Lot 306;

thence West along the South line of said Land Lots 306 and 335 and said Fractional Land Lot 343 a distance of 6750 feet, more or less, to the left bank of the Chattahoochee River;

thence Northwesterly upstream along the meanders of said left bank 5500 feet, more or less, to a corner of a tract of land now or formerly owned by Mrs. Frankie G. Chambers;

thence S 89° E along the boundary of said Chambers tract 5000 feet, more or less, to a corner of said Chambers tract;

thence N 69° E along the boundary of said Chambers tract 625 feet, more or less, to the East line of said Land Lot 343;

thence North along the East line of said Land Lots 343 and 344 a distance of 1610 feet, more or less, to the center of Georgia State Highway 39 and at a corner of a tract of land now or formerly owned by Walter Lee Peterson, et ux;

thence Southeasterly along the center line of said highway 750 feet, more or less, to a corner of said Peterson tract;

thence North along the boundary of said Peterson tract 550 feet, more or less, to a corner of said Peterson tract;

thence West along the boundary of said Peterson tract 250 feet, more or less, to a corner of a tract of land now or formerly owned by Lee Davis;

thence North along the boundary of said Davis tract 350 feet, more or less, to a corner of a tract of land now or formerly owned by Gus Holley;

thence East along the boundary of said Holley tract 200 feet, more or less, to a corner of said Holley tract;

thence North along the boundary of said Holley tract 250 feet, more or less, to a corner of said Holley tract;

thence West along the boundaries of said Holley tract and a tract of land now or formerly owned by Gussie Pitts 300 feet, more or less, to the center of a road and at a corner of said Pitts tract;

thence Southwesterly along the center line of said road which is along the boundary of said Pitts tract 100 feet, more or less, to a corner of said Pitts tract;

thence West along the boundary of said Pitts tract 150 feet, more or less, to the West line of said Land Lot 334;

thence North along the West line of said Land Lot 334 a distance of 450 feet, more or less, to a corner of a tract of land now or formerly owned by Everzetta Bray;

thence S 72° E along the boundary of said Bray tract 300 feet, more or less, to the center of a road which is along the boundary of said Bray tract;

thence Northerly along the center line of said road which is along the boundary of said Bray tract and a tract of land now or formerly owned by Susana Wade Wilson 910 feet, more or less, to the North line of said Land Lot 334;

thence East along the North line of said Land Lot 334 and said Land Lot 307 a distance of 5625 feet, more or less, to the Northeast corner of said Land Lot 307;

thence North along the West line of said Land Lot 293 a distance of 3025 feet, more or less, to the Northwest corner of said Land Lot 293;

thence East along the North line of said Land Lot 293 a distance of 2750 feet, more or less, to a point which is 350 feet, West of the Northeast corner of said Land Lot 293;

thence South along a line parallel to the East line of said Land Lot 293 a distance of 900 feet; \* \* \*

thence N  $62^{\circ} 05' 51''$  E 411.79 feet to a point which is in the center of Loci Foci Road and 700.06 feet S  $01^{\circ} 08' 41''$  W from the Northwest corner of said Land Lot 268;

thence S  $01^{\circ} 08' 41''$  W along the center line of said road 200.01 feet;

thence S  $30^{\circ} 31' 08''$  W 704.85 feet to a point which is 1500 feet South of the North line and 350 feet East of the West line of said Land Lot 293;

• thence West along a line parallel to the North line of said Land Lot 293 a distance of 200 feet;

thence South along a line parallel to the East line of said Land Lot 293 a distance of 250 feet;

thence S  $30^{\circ}$  E 350 feet, more or less, to a point which is 300 feet West of the East line and 2000 feet South of the North line of said Land Lot 293;

thence South along a line parallel to the East line of said Land Lot 293 a distance of 350 feet;

thence S 30° W 300 feet, more or less, to a point which is 450 feet West of the East line and 450 feet North of the South line of said Land Lot 293;

thence West along a line parallel to the South line of said Land Lot 293 a distance of 450 feet;

thence S 30° W 500 feet, more or less, to a point which is on the South line of said Land Lot 293 a distance of 1150 feet West of the Southeast corner of said Land Lot 293;

thence West along the South line of said Land Lot 293 a distance of 950 feet, more or less, to the center of Sandy Creek;

thence Southwesterly downstream along the meanders of the center line of said creek 1500 feet, more or less, to the West line of said Land Lot 294;

thence South along the West line of said Land Lot 294 a distance of 600 feet, more or less, to the center of a creek;

thence Easterly upstream along the meanders of the center line of said creek 1000 feet, more or less, to the center of a branch;

thence Southeasterly upstream along the meanders of the center line of said branch 600 feet, more or less, to a point 1825 feet West of the East line of said Land Lot 294;

thence South along a line parallel to the East line of said Land Lot 294 a distance of 50 feet, more or less, to a point which is 650 feet North of the South line of said Land Lot 294;

thence West along a line parallel to the South line of said Land Lot 294 a distance of 575 feet, more or less, to a point 2400 feet West of the East line of said Land Lot 294;

thence South along a line parallel to the East line of said Land Lots 294 and 295 a distance of 3450 feet to a point 500 feet North of the South line of said Land Lot 295;

thence West along a line parallel to the South line of said Land Lot 295 a distance of 550 feet;

thence South along a line parallel to the East line of said Land Lot 295 a distance of 500 feet to the South line of said Land Lot 295;

thence West along the South line of said Land Lot 295 a distance of 150 feet, more or less, to the point of beginning.

LESS AND EXCEPT all that tract or parcel of land lying and being Land Lot 334, Seventh Land District, Clay County, Georgia, being more particularly described as follows:

Beginning at a point which is on the West line of said Land Lot 334 a distance of 1050 feet, more or less, South of the Northwest corner of said land lot and at the Northwest corner of the Key Cemetery;

thence East along the boundary of said cemetery 225 feet, more or less, to the center of a road which is along the boundary of said cemetery;

thence Southwesterly along the center line of said road which is along the boundary of said cemetery 225 feet, more or less, to a corner of said cemetery;

thence West along the boundary of said cemetery 150 feet, more or less, to the West line of said land lot which is the boundary of said cemetery;

thence North along the West line of said land lot which is the boundary of said cemetery 225 feet, more or less, to the point of beginning.

Containing 1.00 acre, more or less.

LESS AND EXCEPT a tract of land now or formerly owned by Anna Harris described as follows:

All that tract or parcel of land lying and being in Land Lot 334, Seventh Land District, Clay County, Georgia, being more particularly described as follows:

Beginning at a point which is 30 feet, more or less, South of the North line and 1525 feet, more or less, East of the West line of said Land Lot 334 and at a corner of a tract of land now or formerly owned by Anna Harris;

thence East along the boundary of said Harris tract 210 feet, more or less, to a corner of said Harris tract;

thence South along the boundary of said Harris tract 210 feet, more or less, to a corner of said Harris tract;

thence West along the boundary of said Harris tract 210 feet more or less, to a corner of said Harris tract;

thence North along the boundary of said Harris tract 210 feet, more or less, to the point of beginning.

Containing 1.00 acre, more or less, and being substantially the same land described in a deed from E. A. Greene to Anna Harris, dated 15 March 1937, and recorded

in Deed Book W, page 451, of the records in the Office of the Clerk of the Superior Court of Clay County, Georgia.

The land described hereinabove contains a net total of 1300.00 acres, more or less, and designated as Tract B-201 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-1

All that portion of Land Lot 295, Seventh Land District, Clay County, Georgia, that lies below the contour at Elevation 196.8 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is on the South line of said Land Lot 295 a distance of 350 feet West of the Southeast corner of said land lot;

thence West along the South line of said land lot 700 feet;

thence N 30° E 1000 feet, more or less, to a point which is 900 feet North of the South line and 600 feet West of the East line of said land lot;

thence East along a line parallel to the South line of said land lot a distance of 250 feet;

thence South along a line parallel to the East line of said land lot a distance of 900 feet to the point of beginning.

Containing 2.30 acres, more or less, and designated as Tract B-201-E-1 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-2

All that portion of Land Lot 295, Seventh Land District, Clay County, Georgia, that lies below the contour at

Elevation 196.8 feet above Mean Sea Level and within a portion of said land lot-described as follows:

Beginning at a point which is on the South line of said Land Lot 295 a distance of 1400 feet West of the Southeast corner of said land lot;

thence West along the South line of said land lot a distance of 950 feet;

thence North along a line parallel to the East line of said land lot a distance of 1150 feet;

thence East along a line parallel to the South line of said land lot a distance of 950 feet;

thence South along a line parallel to the East line of said land lot a distance of 1150 feet to the point of beginning.

Containing 10.79 acres, more or less, and designated as Tract B-201-E-2 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-3

All that portion of Land Lot 293, Seventh Land District, Clay County, Georgia, that lies below the contour at Elevation 196.8 feet above Mean Sea Level and within a portion of said land lot-described as follows:

Beginning at a point which is on the South line at said Land Lot 293 a distance of 700 feet West of the Southeast corner of said land lot;

thence West along the South line of said land lot a distance of 450 feet;

thence N 30° E 500 feet, more or less, to a point which is 450 feet North of the South line and 900 feet West of the East line of said land lot;

thence East along a line parallel to the South line of said land lot a distance of 450 feet;

thence S 30° W 500 feet, more or less, to the point of beginning.

Containing 2.76 acres, more or less, and designated as Tract B-201-E-3 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-4

All that portion of Land Lots 268 and 293, Seventh Land District, Clay County, Georgia, that lies below the contour at Elevation 196.8 feet above Mean Sea Level and within a portion of said land lot described as follows:

Beginning at a point which is on the North line at said Land Lot 293 a distance of 200 feet West of the Northeast corner of said Land Lot 293;

thence South along a line parallel to the East line of said Land Lot 293 a distance of 500 feet;

thence East along a line parallel to the North line of said Land Lot 293 and subsequently along a line parallel to the North line of said Land Lot 268 a distance of 207 feet, more or less, to the center of Loci Foci Road;

thence S 01° 08' 41" W along the center line of said road 200 feet, more or less, to a point which is 700.06 feet S 01° 08' 41" W from the Northwest corner of said Land Lot 268;

thence S  $62^{\circ} 05' 51''$  W 411.79 feet to a point which is 350 feet West of the East line and 900 feet South of the North line of said Land Lot 293;

thence North along a line parallel to the East line of said Land Lot 293 a distance of 900 feet to the North line of said Land Lot 293;

thence East along the North line of said Land Lot 293 a distance of 150 feet to the point of beginning.

Containing 2.07 acres, more or less, and designated as Tract B-201-E-4 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-5

All that tract or parcel of land lying and being in Land Lot 294, 295, 266 and 267, Seventh Land District, Clay County, Georgia, being a portion of the right-of-way for the proposed relocation of State Highway Number 39, being more particularly described as follows:

Beginning at a point which is at the Southeast corner of said Land Lot 295, in the center of Loci Foci Road and at Station 109+46.84 on the center line of said proposed relocation;

thence N  $89^{\circ} 42' 15''$  W along the South line of said Land Lot 295 a distance of 50.00 feet;

thence N  $01^{\circ} 08' 45''$  E 1500.88 feet;

thence Northerly along a curve to the right with a radius of 22,968.32 feet, an arc distance of 689.40 feet, the long chord of which bears N  $02^{\circ} 00' 20''$  E 689.25 feet;

thence N  $02^{\circ} 51' 56''$  E 1515.96 feet;

thence Northerly along a curve to the right with a radius of 11,509.16 feet, an arc distance of 239.00 feet, the long chord of which bears N 03° 22' 30" E 238.94 feet to the boundary of a tract of land now or formerly owned by Lenora Bryant;

thence S 86° 44' 00" E along the boundary of said Bryant tract 30 feet, more or less, to the center of said Loci Foci Road;

thence Southerly along the center line of said road 3944.0 feet, more or less, to the point of beginning.

Containing 4.60 acres, more or less, and designated as Tract B-201-E-5 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-6

All that tract or parcel of land lying and being in Land Lots 268 and 293, Seventh Land District, Clay County, Georgia, being a portion of the right-of-way for the proposed relocation of State Highway 39 being more particularly described as follows:

Beginning at a point which is 900.07 feet S 01° 03' 41" W from the Northwest corner of said Land Lot 268 in the center of Loci Foci Road and at Station 192+68.34 on the center line of said proposed relocation;

thence S 30° 31' 08" W 101.93 feet;

thence S 01° 08' 41" W 478.05 feet;

thence Southerly along a curve to the left with a radius of 5779.58 feet, an arc distance of 924.26 feet, the long chord of which bears S 03° 26' 12" E 923.23 feet to the center of said Loci Foci Road;

thence Northerly along the center line of said road 1483.00 feet, more or less, to the point of beginning.

Containing 1.25 acres, more or less, and designated as Tract B-201-E-6 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-7

All that tract or parcel of land lying and being in Land Lots 268 and 293, Seventh Land District, Clay County, Georgia, being a portion of the right-of-way for the proposed relocation of State Highway Number 39 being more particularly described as follows:

Beginning at the Northwest corner of said Land Lot 268 in the center of Loci Foci Road and at Station 201+68.41 on the center line of said proposed relocation;

thence S  $01^{\circ} 08' 41''$  W along the center line of said road 700.06 feet;

thence S  $62^{\circ} 05' 51''$  W 57.19 feet;

thence N  $01^{\circ} 08' 41''$  E 728.25 feet to the North line of said Land Lot 293;

thence S  $88^{\circ} 22' 19''$  E along the North line of said Land Lot 293 a distance of 50.00 feet to the point of beginning.

Containing 0.80 acres, more or less, and designated as Tract B-201-E-7 of the Walter F. George Lock and Dam.

#### TRACT B-201-E-8

All that tract or parcel of land lying and being in Land Lot 295, Seventh Land District, Clay County, Georgia, be-

ing a portion of the right-of-way for a proposed road, being more particularly described as follows:

Commencing at a point which is on the East line of said Land Lot 295 a distance of 728.49 feet South of the Northeast corner of said land lot;

thence N  $87^{\circ} 07' 32''$  W 29.45 feet to the West right-of-way line of the proposed relocation of State Highway 39 and THE POINT OF BEGINNING;

thence S  $02^{\circ} 51' 56''$  W along said West right-of-way of the proposed relocation of State Highway 39 a distance of 100.05 feet;

thence N  $87^{\circ} 07' 32''$  W 130.66 feet;

thence Northwesterly along a curve to the right, with a radius of 766.20 feet, an arc distance of 454.67 feet, the long chord of which bears N  $70^{\circ} 07' 26''$  W 448.02 feet;

thence N  $53^{\circ} 07' 21''$  W 379.29 feet;

thence Westerly along a curve to the left with a radius of 904.93 feet, an arc distance of 781.01 feet, the long chord of which bears N  $77^{\circ} 50' 53''$  W 756.98 feet;

thence S  $77^{\circ} 25' 35''$  W 783.84 feet;

thence N  $01^{\circ} 08' 45''$  E 102.94 feet;

thence N  $77^{\circ} 25' 35''$  E 759.43 feet;

thence Easterly along a curve to the right with a radius of 1004.93 feet, an arc distance of 867.32 feet, the long chord of which bears S  $77^{\circ} 50' 53''$  E 840.64 feet;

thence S  $53^{\circ} 07' 21''$  E 379.29 feet;

thence Southeasterly along a curve to the left, with a radius of 666.20 feet, an arc distance of 395.33 feet, the long chord of which bears S 70° 07' 26" E 389.54 feet;

thence S 87° 07' 32" E 130.64 feet to the point of beginning.

Containing 5.80 acres, more or less, and designated as Tract B-201-E-8 of the Walter F. George Lock and Dam.

Tracts B-201, B-201-E-1, B-201-E-2, B-201-E-3, B-201-E-4, B-201-E-5, B-201-E-6, B-201-E-7 and B-201-E-8 contain in the aggregate 1331.37 acres, more or less, and being a part of the same land devised in the Will of Edward A. Greene to Edward N. Gavin, James F. Gavin, Chester Gavin, Jr., and Carolyn Gavin Gibson, dated 1 June 1958, and recorded in Will Book "B", page 171 of the records in the Office of the Ordinary of Clay County, Georgia.

\* \* \*

### **REPORT OF COMMISSIONERS.**

(Filed August 19, 1960. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

To the Honorable W. A. Bootle, United States Judge for  
the Middle District of Georgia:

Pursuant to notice given to all parties concerned, the evidentiary hearing on condemnation of the above listed tracts was held in the United States Court Room in Columbus, Georgia, beginning at 10:00 o'clock, A. M., on June 14, 1960, and continuing through June 17, 1960.

It was stipulated by the parties that the owners of the several tracts, with each owning an undivided one-fourth

interest in each and all the tracts listed at the time of the taking by the United States, were Mrs. Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin and Chester Gavin, Jr.

Tract B201 is comprised of 1301 acres as shown by the maps and plats placed in evidence and in addition some 44 acres more or less situate between the west line of such tract along the east bank of the Chattahoochee River as shown on such maps and the west bank of the Chattahoochee River, the actual west property line of the Land Owners; Tract B201E1 is a perpetual flowage easement over 2.30 acres; Tract B201E2 is a perpetual flowage easement over 10.79 acres; Tract B201E3 is a perpetual flowage easement over 2.76 acres; Tract B201E4 is a perpetual flowage easement over 2.07 acres; Tract B201E5 is a perpetual road easement over 4.6 acres; Tract B201E6 is a perpetual road easement over 1.25 acres; Tract B201E7 is a perpetual road easement over 0.8 acres; Tract B201E8 is a perpetual road easement over 5.8 acres. The date of taking of the land by the Government was June 23, 1959.

At the conclusion of the evidence the parties waived oral argument, and it was agreed that the Commission would take the matter under advisement, with either party being entitled to file written briefs and argument, the Commission to render its decision as to the amount of just compensation at a later date.

The hearing was attended by Mr. Claude Joiner, Jr., official court reporter, and all of the testimony produced was taken down by him. A transcription of the proceedings will be available in the event desired.

In accordance with the prior order of this Court, the Commission makes the following summarization of evidence, findings of fact, conclusions of law, and award of just compensation.

### **Summarization of Evidence.**

The Commission went upon and over the property on June 13, 1960. A representative from the Government was present and, together with Mrs. Carolyn Gavin Gibson, one of the owners, accompanied the Commission on the inspection. The improvements had been removed, and none of the property was in cultivation with annual row crops. However, the general topography and contour of the land, the character of the soil, lands theretofore devoted to row crops, and other characteristics of the land were noted by the Commission. The Commission has given consideration to charts, maps, photographs, etc., which were introduced into evidence by the parties.

#### **(a) EVIDENCE FOR THE LAND OWNERS.**

1. Joe B. Graham, engineer, estimated the acreage between the west line of the property as described in the declaration of taking and the west line of Land Owners' property coinciding with the Georgia-Alabama line on the west side of the Chattahoochee River as between 42 and 44 acres.

2. Dozier Torbert testified as to the sale of an allegedly comparable tract of 120 acres for \$11,000.00.

3. W. O. Sellers, county agent, testified of 12 years' acquaintanceship with the subject tract, and as to sale of an allegedly comparable tract of 135 to 160 acres for \$20,000.00.

4. Ben Moon, civil engineer, testified as to acreage of the subject tract, 435 acres between the highway and the river and 880 acres east of the highway.

5. Ralph Crozier, farmer, testified as to 10 years' familiarity with the subject tract, including 2 years of farming a portion of it. He testified that in his opinion the land west of the highway had a fair market value of \$100.00 per acre and that east of the highway, a fair market value of \$75.00 per acre. He further estimated the severance damage to the property remaining as the amount represented by a reduction in value of that 240 acres from \$75.00 per acre to \$45.00 per acre, or if that land be water sogged, to \$25.00 per acre.

6. L. M. Ray, farmer, testified that he had rented and farmed for 6 years a portion of subject tract between the highway and the river. He gave as his opinion that the fair market value of this property was \$90.00 per acre.

7. R. E. Phillips, lumber dealer, testified to 10 years' familiarity with the subject tract. He gave as his opinion a fair market valuation of \$100.00 per acre for that portion west of the highway and \$60.00 per acre for that portion east of the highway. He further testified that in his opinion the acreage remaining was depreciated by the taking in the amount of \$20.00 per acre. This witness also testified as to the sale of an allegedly comparable tract of 1432 acres for \$105,000.00, which included \$15,000.00 for timber. On cross-examination, he testified that grantor of this property had purchased it three months earlier for \$90,000.00. Witness further testified that he had cut timber off the subject tract in 1958.

8. Henry Hayes testified as to the cost of fencing as cost of wire at ten cents per foot, cost of corner posts and brace at \$3.50, posts at sixty-five cents, and labor at \$140.00 to \$150.00 per mile without clearance of right of way. He estimated cost of fencing property remaining at \$3,300.00 to \$3,500.00. On cross-examination, he testified that he was totally unfamiliar with the necessities of the terrain of the property remaining.

9. Hoke Lindsey testified that he had worked a portion of the subject tract lying west of the highway for three years. He gave as his opinion the fair market value of this land as \$100.00 per acre.

10. Jesse G. Bowles, attorney, testified as to the sales of two allegedly comparable tracts, one of 200 acres for \$16,250.00, and one 202 1/2 acres for \$15,150.00. He further testified as his opinion the fair market value of the subject tract to be \$100.00 per acre for land west of the highway and \$75.00 to \$80.00 per acre for land east of the highway.

11. Mrs. Carolyn Gavin Gibson, one of the Land Owners, testified as to income from the property from the Soil Bank and from rentals. She further testified as to Land Owners' claim of entitlement to \$127,919.58 made up of:

435 acres west of the highway at \$100 per acre	\$43,500.00
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Lands east of the highway at \$85 per acre	76,646.20
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Severance damage comprised of:

(1) 25% damage to acreage	4,773.38
and (2) cost of fencing	3,000.00

Total	<u>\$127,919.58,</u>
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which total included allowance for easements except that no allowance was made for the road easements.

12. Robert L. Garrett, real estate appraiser and expert value witness, testified as to study and appraisal of subject tract, basing his valuation testimony mostly upon the comparative approach. He estimated the fair market value of the land west of the highway at \$83.00 per acre and that east of the highway at \$65.00 per acre. He testified as to

the value of the entire tract as	\$110,250.00
the value of remainder after taking as	10,720.00
and the amount of entitlement as	<u>\$ 99,530.00</u>

Witness further testified as to his opinion as to the fair market value of the properties involved as follows:

Value of property taken in fee	\$93,693.00
Value of easements 1, 2, 3, and 4	874.00
Value of easements 5, 6, and 7—no valuation	
Value of easement 8	377.00
Severance damage	<u>4,586.00</u>
Total	\$93,530.00

Witness further testified that he computed flowage easements at 75% of land value of \$65.00 per acre or \$48.75 per acre and severance damage on the basis of 10% of \$65.00 per acre plus fencing for the two larger remaining tracts and 1/3 of \$65.00 per acre plus fencing for the two smaller remaining tracts.

13. T. W. Mobley, banker and farmer, testified that he had been familiar with the subject tract since 1926. He placed in his opinion the value of the land west of the

highway at \$100.00 per acre and that east of the highway at \$70.00 per acre. He estimated the cost of needed fencing on the remaining property at \$4,492.60.

14. D. B. Perkins, farm supervisor, testified that he examined the subject tract and fixed as his opinion the value of the property west of the highway at \$100.00 per acre and that east of the highway at \$70.00 per acre. He estimated the cost of needed fencing on the remaining property at \$3,474.45.

(b) EVIDENCE FOR THE GOVERNMENT.

1. Ed J. Barter, project manager, identified and testified concerning Government exhibits 1, 2, 3, 4 and 6.

2. Hugh C. Couser, hydraulic engineer, identified and testified concerning Government exhibit 5.

3. Clayton Morris, forester, testified that he had valued the timber on the subject tract at \$578.00. He further testified that he had valued the timber on the tracts offered as comparables by Land Owners as of the respective dates of sale as follows:

Land Owners Comparable No. 1	\$725.00
Land Owners Comparable No. 2	1100.00
Land Owners Comparable No. 4	2220.00
Land Owners Comparable No. 5	1837.50

4. Thomas H. Cleveland, experienced in timber, testified as to valuation on timber located on Government offered comparables No. 3 and No. 5 as reflected by Government exhibit 9:

5. Harry C. Priddy, land appraiser and expert value witness for the Government, identified and testified con-

cerning Government exhibits 7, 8, and 9. He testified as to his study of the subject tract and extensive study of the record of real estate transactions in the vicinity. He testified as to the details of the several tracts, sales of which were offered as evidence by the Government as comparables. He placed in his opinion the fair market value of the property taken in fee of subject tract

as	\$56,100.00
and easements and severance damage at	3,200.00
for a total of	<hr/> \$59,300.00

(c) REBUTTAL EVIDENCE.

In rebuttal, Land Owners offered the testimony of W. C. Worthy to the effect that as to the Government offered comparable sale No. 6, there was less than \$1,000.00 timber value rather than around \$9,000.00 as contended by the Government through witness Priddy and Government exhibit 9. In behalf of the Government in rebuttal, Roy Burns testified that the books of W. C. Bradley Company reflect \$9,932.00 timber value on this tract as of the date of purchase. Thereupon, the evidence was closed on both sides.

**Findings of Fact.**

The Commission finds from the evidence as a whole the following:

1. Mrs. Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin, and Chester Gavin, Jr., according to the stipulation between the parties, were the owners of the several tracts herein described, each owning an undivided

one-fourth interest in each and all such tracts at the time of the taking by the United States on June 23, 1959.

2. The highest and best use to which these tracts could have been put at the time taken by the Government was that of farming, pasturage and timber growing.

3. The property remaining after the taking, instead of lying and being as theretofore in one large tract, is comprised of four smaller separated tracts of 144.09 acres, 59.4 acres, 17.58 acres, and 3.56 acres, respectively; and their use and value is impaired by the taking. The Commission finds that as a consequence the owners are entitled to severance damages in the amount of \$4,480.00.

4. The Commission finds that the fair market value of the fee in Tract B201, including the land lying between the banks of the river, was \$105,080.00 when it was taken by the United States on June 23, 1959.

5. The Commission finds that the fair market value of the easement over Tract B201E1 was \$80.00 when it was taken by the United States on June 23, 1959.

6. The Commission finds that the fair market value of the easement over Tract B201E2 was \$400.00 when it was taken by the United States on June 23, 1959.

7. The Commission finds that the fair market value of the easement over Tract B201E3 was \$120.00 when it was taken by the United States on June 23, 1959.

8. The Commission finds that the fair market value of the easement over Tract B201E4 was \$80.00 when it was taken by the United States on June 23, 1959.

9. The Commission finds that the fair market value of the easement over Tract B201E5 was \$None when it was taken by the United States on June 23, 1959.

10. The Commission finds that the fair market value of the easement over Tract B201E6 was \$None when it was taken by the United States on June 23, 1959.

11. The Commission finds that the fair market value of the easement over Tract B201E7 was \$None when it was taken by the United States on June 23, 1959.

12. The Commission finds that the fair market value of the easement over Tract B201E8 was \$None when it was taken by the United States on June 23, 1959.

13. Mrs. Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin, and Chester Gavin, Jr., are entitled to an award and judgment against the United States for the taking of the property in question in the amount of \$110,240.00, together with interest on that part of the amount so awarded which is in excess of the deposit made by the United States at the rate of 6% per annum in accordance with the law.

#### Conclusions of Law.

1. The United States had the right, in the exercise of its power of eminent domain, to take all of the property of Mrs. Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin, and Chester Gavin, Jr., involved in these proceedings.

2. The owners of these tracts of land are entitled to just compensation for the taking thereof, which compensation must represent the fair market value of all of the property taken as of the date it was taken by the United States.

3. The owners of these tracts of land are further entitled to severance damages as a part of just compensation.

4. The motion of the District Attorney to strike and exclude testimony concerning Land Owners' comparable No. 4 is denied and overruled.

5. The entire body of these several tracts of land involved in this proceeding is situated in Clay County, Georgia, within the Columbus Division of the United States District Court for the Middle District of Georgia; and, accordingly, the Commission, as constituted by the Court in its order entered in these proceedings on December 22, 1959, has jurisdiction for the purpose of determining the amount of just compensation to be paid by the United States for the taking of such land.

Wherefore, the undersigned Commissioners recommend to the Court, that Judgment be entered herein awarding just compensation to Mrs. Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin, and Chester Gavin, Jr., as the owners of the lands condemned in the amount and in the manner hereinabove specified.

Respectfully submitted this August 19, 1960.

/s/ Mallory C. Atkinson,  
Mallory C. Atkinson, Chairman,

/s/ J. P. Champion,  
J. P. Champion,

/s/ Hines Preston,  
Hines Preston,  
Commissioners.

Copies mailed by Judge Atkinson on 8/19/60.

/s/ John P. Cowart,  
Clerk.

**OBJECTIONS TO REPORT OF COMMISSIONERS.**

(Filed August 29, 1960. Jennie L. Stricklin, Deputy Clerk, United States District Court.)

The United States of America, plaintiff in the above entitled cause, objects to the Report of Commissioners filed in this cause on August 19, 1960 on the following grounds:

1. The Report does not contain sufficient specific findings as to the matters on which the Commissioners based their valuation.
2. The Report does not sufficiently set forth the principles of law which the Commissioners applied in arriving at their conclusion as to value.
3. The award is excessive, outside the range of any proper testimony, against the weight of the evidence and clearly shows that the Commissioners disregarded recent sales of similar properties.
4. The award is outside the range of market value and therefore clearly erroneous.
5. The Commissioners erred in failing to exclude the testimony concerning landowners' comparable sale number 4 and it is impossible to determine to what extent, if any, this testimony entered into the Commissioners' valuation.

Wherefore, Plaintiff moves that the Court reject the Report and the findings and conclusions of the Commissioners and make an independent valuation of its own to conform with the clear weight of the evidence as to fair market value or in the alternative remand to the Commissioners for (1) a re-determination of the issue of just com-

pensation in the terms of fair market value with appropriate additional instructions as to the use of comparable sales, the weight to be accorded a view of the premises, the irrelevancy of consequential damages and as to the guide of the recent sales of similar properties when fair market value can be thus ascertained, and (2) proper findings as to the basic facts together with the principles of law which were applied in arriving at conclusion of value.

Respectfully submitted,

/s/ Truett Smith,

Truett Smith,

Assistant United States Attorney

Address:

P. O. Box 118,  
Macon, Georgia.

#### Certificate of Mailing.

I, Truett Smith, Assistant United States Attorney, hereby certify that on this 26th day of August, 1960, I mailed a copy of the foregoing objections to the attorneys for the landowners, Mr. Forrest L. Champion, Jr., P. O. Box 196, Columbus, Georgia, and Mr. William Lowrey Stone, Blakely, Georgia, by depositing the same in the United States mail in a franked envelope addressed as above set out.

/s/ Truett Smith,

Truett Smith,

Assistant United States Attorney.

**ORDER ADOPTING REPORT OF COMMISSIONERS.**

(Filed February 17, 1961. Walter F. Doyle, Deputy  
Clerk, United States District Court.)

The Commissioners having filed their report fixing just compensation, condemnor having filed objections to said report, both sides having filed briefs in support or of in opposition thereto, and said report, objections and briefs having been carefully considered,

The said report of the Commissioners is hereby approved and adopted by the court.

Let counsel for condemnor prepare and submit an appropriate judgment.

SO ORDERED, this 16 day of February, 1961.

/s/ W. A. Bootle,

United States District Judge.

I certify that I have today mailed a copy of the within order to Mr. Truett Smith, Asst. U. S. Attorney, Macon Ga., Mr. W. Lowery Stone, Attorney at Law, Blakely, Ga., and Mr. Forrest L. Champion, Jr., Attorney at Law, Columbus, Ga. & Foley, Chappell, Young & Hollis, Columbus, Ga. This Feb. 17, 1961.

/s/ Walter F. Doyle,

Chief Deputy Clerk.

**JUDGMENT.**

(Filed April 25, 1961. Walter F. Doyle, Deputy Clerk,  
United States District Court.)

That an order heretofore entered adopted and confirmed the Commissioners' Report on Tracts Nos. B-201, B-201-E-1, B-201-E-2, B-201-E-3, B-201-E-4, B-201-E-5, B-201-E-6, B-201-E-7 and B-201-E-8 finding the just compensation for the taking of the property being acquired herein as Tracts Nos. B-201, B-201-E-1, B-201-E-2, B-201-E-3, B-201-E-4, B-201-E-5, B-201-E-6, B-201-E-7 and B-201-E-8 to have been the sum of \$110,240.00 at the time of the taking thereof by the United States of America, IT IS ADJUDGED, ORDERED AND DECREED that Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin and Chester Gavin, Jr., do have and recover of and from the United States of America the amount of just compensation of \$110,240.00.

It appearing to the Court:

That from a Certificate of the Tax Collector of Clay County, Georgia, exhibited to the Court by the United States Attorney, that there are no taxes due on these tracts, and

That the United States of America has the right to condemn the subject property interest for public use, and

That the estate or interest condemned and the legal description of the subject property are both defined by the Petition in Condemnation and the Declaration of Taking filed herein, and title to said estate or interest in said subject property is vested in the United States, and

That the United States of America deposited in the Registry of this Court on June 23, 1959, at the time of filing its Declaration of Taking in this proceeding, the sum of \$61,650.00, as the estimated compensation for said property interests, and that the difference between the amount of the deposit of estimated compensation, as aforesaid; and the value of said property interests, as aforesaid, is the sum of \$48,590.00, and

That an order heretofore entered found that the United States of America was entitled to a reasonable rental of \$580.00 arising under a claim for reasonable rental filed against Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin and Chester Gavin, Jr., on February 10, 1961.

Therefore, IT IS ORDERED:

That judgment be, and the same hereby is, rendered against the United States of America and in favor of Carolyn Gavin Gibson, Edward M. Gavin, James F. Gavin and Chester Gavin, Jr., in the sum of \$48,010.00 (representing the difference between \$48,590.00 and \$580.00), together with interest on \$48,590.00 from June 23, 1959, until February 10, 1961 (representing the date the United States of America filed its claim for reasonable rental) at the rate of six percent per annum, also together with interest on \$48,010.00 at the rate of six percent per annum from February 10, 1961, until payment into the Registry of this Court.

This cause is held open for such further orders, judgments and decrees as may be necessary in the premises.

This 24 day of April, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith,

Truett Smith,

Assistant United States Attorney.

### NOTICE OF APPEAL.

(Filed June 22, 1961. H. Okay Parker, Deputy Clerk,  
United States District Court.)

Comes now Floyd M. Buford, United States Attorney,  
and Truett Smith, Assistant United States Attorney, coun-  
sel for appellant, the United States of America, and hereby  
gives notice of appeal to the United States Court of Appeals  
for the Fifth Circuit from the final judgment entered in  
this cause on April 25, 1961.

Floyd M. Buford,

United States Attorney

B: /s/ Truett Smith,

Truett Smith,

Assistant United States Attorney.

Address:

P. O. Box 118

Macon, Georgia

### Certificate of Service.

I hereby certify that a true and exact copy of the above  
and foregoing Notice of Appeal has been served on W. L.  
Stone, Blakely, Georgia; Kelly, Champion & Henson,

Columbus Bank and Trust Company Building, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for Carolyn Gavin Gibson, Edwin M. Gavin, James F. Gavin and Chester Gavin, Jr., former owners, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 21st day of June, 1961.

/s/ Truett Smith,  
Truett Smith,

Assistant United States Attorney

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Nos. 19344, 19345

**UNITED STATES OF AMERICA, Appellant**

v.

**2,872.88 ACRES IN CLAY AND QUITMAN COUNTIES,  
GEORGIA, AND FRANK HUMBER ET AL. (TRACTS  
H-805, H-805-E-1 through H-805-E-4, M-1306 and M-1306-E)  
UNITED STATES OF AMERICA, Appellant**

v.

**1,361.09 ACRES IN CLAY COUNTY, GEORGIA,  
AND CAROLYN GAVIN GIBSON ET AL.  
(TRACTS B-201, B-201-E-1 through B-201-E-8)**

**DESIGNATION OF RECORD FOR PRINTING AND  
STATEMENT OF POINTS ON APPEAL.**

The United States of America, appellant herein, designates the following portions of the records in these cases to be printed:

**From the Record of Civil No. 789.**

1. Complaint in Condemnation, excluding those portions of paragraph 6 and of Schedule A pertaining to tracts other than the H-805 and M-1306 series.

2. Order Appointing Commissioners.

3. Instructions to Commissioners.

4. Amendment to Orders Appointing Commissioners.

5. Order on Pre-Trial Hearing Before Commissioners.

6. Report of Commissioners on H-805 series.

7. Report of Commissioners on M-1306 and M-1306-E.

8. Objections to Report of Commissioners on H-805 series.

9. Objections to Reports of Commissioners on M-1306 and M-1306-E.

10. Order of Court Adopting Report of Commissioners on H-805 series.

11. Order of Court Adopting Report of Commissioners on M-1306 and M-1306-E.

12. Judgment on Order Adopting Report of Commissioners on H-805 series.

13. Judgment on Order Adopting Report of Commissioners on M-1306 and M-1306-E.

14. Notice of Appeal on H-805 series.

15. Notice of Appeal on M-1306 and M-1306-E.

**From the Record of Civil No. 792.**

1. Complaint in condemnation, excluding those portions of paragraph 6 and of Schedule A pertaining to tracts other than the B-201 series.
2. Report of Commissioners on B-201 series.
3. Objections to Report of Commissioners on B-201 series.
4. Order of Court Adopting Report of Commissioners on B-201 series.
5. Judgment on Order Adopting Report on B-201 series.
6. Notice of Appeal on B-201 series.
7. This Designation of Record for Printing and Statement of Points on Appeal.

The United States, not having designated the entire record for printing, states that the following are the points on which it intends to rely on appeal:

1. The district court erred in failing and refusing to order the commissioners to make complete findings of fact and conclusions of law.
2. The district court erred in approving and adopting the reports of the commissioners when the findings were inadequate to determine the basis on which the awards were made.
3. The district court erred in adopting and approving the reports when the reports themselves show that there were conflicts in the evidence but do not show how the commissioners resolved them in making the awards.

4. The district court erred in entering judgment for just compensation on the basis of these inadequate reports.

Dated the 24th day of November, 1961.

/s/ Ramsey Clark,  
 Ramsey Clark,  
 Assistant Attorney General,  
 /s/ S. Billingsley Hill,  
 S. Billingsley Hill,  
 /s/ Hugh Nugent,  
 Hugh Nugent,  
 Attorneys, Department of  
 Justice, Washington 25,  
 D. C.

**Certificate of Service.**

I certify that the foregoing Designation of Record for Printing and Statement of Points on Appeal has been served upon the appellees by mailing copies thereof, postage prepaid, to Jesse G. Bowles, Cuthbert, Georgia; Kelly, Champion & Henson, P. O. Box 1975, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, Fourth National Bank Building, Columbus, Georgia; and W. L. Stone, Blakely, Georgia, attorneys of record for the condemnees, on this 24th day of November, 1961.

/s/ S. Billingsley Hill,  
 S. Billingsley Hill.

**ORDER TRANSMITTING ORIGINAL PAPERS AND  
EXHIBITS.**

(Filed November 3, 1961. John P. Cowart, Clerk,  
United States District Court.

It appearing to the Court that the original papers and exhibits, comprising the entire record of the above-entitled case, should be sent to the United States Court of Appeals for the Fifth Circuit in lieu of copies,

It is therefore ORDERED pursuant to Rule 75(i), F.R.Civ.P., that the Clerk of this Court is to transmit, in physical form and without copying, to the Clerk of the United States Court of Appeals for the Fifth Circuit, the original papers and exhibits comprising the entire record in this case, and

It is further ORDERED that the original papers and exhibits shall be received by the Clerk of the Court of Appeals and held by him during the pending of the appeal herein for the use of the Court and counsel, and

It is further ORDERED that after the termination of the proceedings on appeal the Clerk of the Court of Appeals shall return the original papers and exhibits to the Clerk of this Court.

This 3rd day of November, 1961.

/s/ W. A. Bootle,

United States District Judge.

Presented by:

/s/ Truett Smith

Truett Smith,

Assistant United States Attorney.

**Certificate of Service.**

I hereby certify that a true and exact copy of the above and foregoing Order Transmitting Original Papers and Exhibits has been served on W. L. Stone, Blakely, Georgia; Kelly, Champion & Henson, Columbus Bank and Trust Company Building, Columbus, Georgia; Frank D. Foley and Bentley H. Chappell, The Fourth National Bank Building, Columbus, Georgia, attorneys of record for Carolyn Gavin Gibson, Edwin M. Gavin, James F. Gavin and Chester Gavin, Jr., former owners, by mailing the copy thereof to them at their respective addresses, as aforesaid.

This 3rd day of November, 1961.

/s/ Truett Smith,  
Truett Smith,

Assistant United States At-  
torney.

[fol. 112]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[fol. 113] Minute entry of Argument and Submission—  
October 17, 1962 (omitted in printing).

[fol. 114]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 19344

UNITED STATES OF AMERICA, Appellant,  
versus

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES, STATE OF GEORGIA, and FRANK  
HUMBER, ET AL., and UNKNOWN OWNERS, Appellees,  
and

No. 19345

UNITED STATES OF AMERICA, Appellant,  
versus

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA, and CAROLYN GAVIN GIBSON,  
ET AL., and UNKNOWN OTHERS, Appellees.

[fol. 115] Appeals from the United States District Court  
for the Middle District of Georgia.

OPINION—December 5, 1962

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.

Tuttle, Chief Judge: These appeals by the United States from District Court judgments approving valuation awards of condemnation commissioners present the question whether the reports of the commissioners were sufficiently detailed as to findings of fact, and in giving the basis on which they were bottomed to permit adequate review by the district court, and thereafter by this Court.

These condemnation suits are a part of a program of land acquisition for the Walter F. George Lock and Dam project on the Chattahoochee River in Georgia and Alabama. The three series of tracts involved are all tracts of ordinary farm, timber and pasture land. While the government requested a jury trial, it does not now contend that the submission of the issues to commissioners by the trial court constituted reversible error. Neither does the government, on the record before us, assign any specific error in the hearings before the commissioners as a basis for attacking the judgment of the district court in affirming the report of the commissioners. Instead, the government takes the position that the reports of the commissioners are in such general and vague terms as to make it impossible for the district court or for this Court on appeal to determine [fol. 116] whether the commissioners' ultimate conclusions of value were based on legally correct principles or on legally sufficient evidence.

The appellees here, first, claim that the Court of Appeals cannot take notice of the government's appeal, because it does not expressly contend that the awards are excessive. They take the position, therefore, that any claim by the government that there was error in the form or substance of the commissioners' reports falls within the "harmless error" rule of the Federal Rules of Civil Procedure, Rule 61 F.R.C.P. We think this contention is without merit. It is apparent from the findings of the commissioners that the awards made by them and approved by the trial court are substantially in excess of the amounts deposited in court upon the declaration of taking. It thus appears that if errors occurred in the proceedings below, as a result of which judgments were awarded in excess of the amounts contended for by the United States, such errors would not be harmless in the sense of the Rule.

In general, the report of the commissioners recited the substance of the valuation testimony given by the several witnesses tendered by the landowners, on the one hand, and by the government on the other, and they made ultimate findings of the market value of the property taken and of severance damages to lands not taken and make certain specific findings as to the value of easements and fences taken, or the cost of fencing the remaining tracts. The reports did not in any manner whatever indicate which evidence the commission credited and which evidence it discredited. The reports gave no indication as to the degree to which it based its findings upon those opinions that were [fol. 117] based on knowledge of comparable sales, nor did they give any indication as to whether indicated sales were truly comparable. The reports did not indicate to what extent it gave credence to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case.

Part of the basis for this Court's repeatedly stating that the trial of condemnation valuation issues is typically for a jury, and the appointment of commissioners is proper only in the exceptional case, *United States v. Buhler*, 5 Cir., 254 F. 2d 876, *United States v. Leavell & Ponder, Inc.*, 286 F. 2d 398, 408, *United States v. Buhler*, 5 Cir., 305 F. 2d 319, 331, is that where a trial is had before a jury, the trial judge is charged with the responsibility of determining the qualifications of so-called expert witnesses and of others who undertake to express opinions as to land values and to determine initially whether so-called "comparable sales," about which witnesses propose to testify, are sufficiently comparable to justify their consideration by the fact-finder, and because, further, the trial judge is able, by correctly charging the jury, to point out the defects and weaknesses in the testimony of interested parties to the proceedings, such as the owners of the land involved, and to stress the importance, as courts have always done, *Baetjer v. United States*, 1 Cir., 143 F. 2d 391, 397; *International Paper Co. v. United States*, 5 Cir., 227 F. 2d 201, 208; *United States v.*

*Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, 407, cert. denied 366 U. S. 944, of opinion evidence based on comparable transactions. In a trial to a jury under such supervision by a trial judge, it can well be understood why a general verdict [fol. 118] dict of value, plus a general verdict of severance damages can suffice, whereas a hearing before a commission must result in findings much more detailed than a general verdict.

The Courts of Appeals of the several circuits are not of a uniform mind as to this; but we find ourselves fully in accord with the reasoning of the Court of Appeals for the Fourth Circuit in *United States v. Cunningham*, 4 Cir., 246 F. 2d 330, 333, where it is said:

"The very reasons which justify the appointment of the commission, however, demonstrates the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an [fol. 119] action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them 'unless clearly erroneous' (Rule 53(e) (2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings."

This Court has expressly approved this language of the Fourth Circuit in *United States v. 2,477.79 Acres of Land in Bell County*, 5 Cir., 259 F. 2d 23, where on page 29, we said:

"We find ourselves in agreement with the Government's position that the findings of the commissioners are wholly inadequate and that the judgment must be vacated and the cause remanded for proper findings and a judgment based thereon. From the report, so styled, of the commissioners nothing appears except a recital of their appointment, a statement that a hearing was had, and the commissioners' conclusions as to values. As examples of the deficiencies in the findings it may be noted that *nothing is found as to how the commissioners resolved the conflicts in the testimony*, no findings appear as to the uses of the land particularly Tract 805, and no determination is made as to benefits. Without explicit findings the trial court cannot adopt or reject the findings or adopt some and reject others. Without adequate findings this Court does not have before it a record which permits of a review of the district court's adjudication. *United States v. Buhler*, supra; *United States v. Cunningham*, [fol. 120] 4 Cir., 1957, 246 F. 2d 330. [Emphasis added.]"

We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States v. Merz*, 10 Cir., 306 F. 2d 39. Our view in this respect is in accord with that of the Court of Appeals for the Ninth Circuit, which has recently reversed judgment of a trial court in California which expressly stated that in a condemnation case, the Commission's finding "may be as general as the verdict of a jury, and have the same effect." In its judgment reversing this decision the Court of Appeals in *United States v. Lewis*, 9 Cir., No. 17,437, dec. July 10, — F. 2d —, said:

"Upon this basic difference we agree with the principles expressed in *Cunningham*. The district judge is not sitting as the presiding judge in a jury-tried

case, but as a reviewing court. He has not heard the evidence nor supervised its admission and thus is in no position to view the commission's report simply as a jury verdict. If the court is intelligently to perform a function of review, it must be able to ascertain whether, in arriving at its value judgment, error was committed by the commission, either in the resolution of factual disputes or in the application of principles of valuation. There must be a sufficient disclosure to the reviewing court to enable it to understand what it is that has been decided. As stated by Mr. Justice Cardozo in *United States v. Chicago M. St. P. & P. Railroad*, 1935, 294 U. S. 499, 510-511:

[fol. 121] 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

Although admittedly the scope of review, either by the trial court of the commissioners' findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based. It is too obvious to require argument that in determining market value the best test is what the same or similar property is selling for in the locality at or near the day of taking. Thus, it is universally recognized that the best test of market value is the data concerning comparable sales. On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion as to whether the sales sustain a value of \$100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others

whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:

"I arrived at it like I'd price mine, just like it is; [fol. 122] that's what it would take to buy mine adjoining Hoke's."

If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value.

This Court has held that in an appeal from a judgment of the trial court where the valuation finding has been made by commissioners, it is the function of the trial court to determine whether the commission's findings are to be approved or are to be reversed under the clearly erroneous standard. *United States v. Twin City Power Company of Georgia*, 5 Cir., 253 F. 2d 197, 204. It is then the function of this Court to determine whether the district court's disposition of the commission's findings was clearly erroneous.

In order that the district court may perform its function, it must be able to determine whether the commission adopted the correct legal principles, and whether the evidence before the commission met the standard of substantiality to withstand a reversal by the district court. As we said in *United States v. Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, at page 406, "The figure arrived at by the commissioners would much better have been supported by subsidiary findings of fact. . . . Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum."

Furthermore, while we do not even suggest the need for long findings or long reports merely for the sake of length, [fol. 123] there is much to be said for the view that commissioners like trial judges may be expected to give more careful consideration to the subsidiary facts and the legal principles involved if they are required to be stated in the report. The language of the opinion of the Court of Appeals for the Second Circuit, in *United States v. Forness*, 2 Cir., 125 F. 2d 928, at page 942 is here apposite:

"It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience

of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."

In order that the commissioners' reports may meet the standards here prescribed, the judgments are Reversed and the cases are Remanded to the trial court for re-submission.

[fol. 124]

IN UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT  
October Term, 1962.

No. 19,344

D. C. Docket No. 789 Civil

UNITED STATES OF AMERICA, Appellant,  
versus

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES, STATE OF GEORGIA, and FRANK  
HUMBER, ET AL., and UNKNOWN OWNERS, Appellees.

Appeals from the United States District Court for the  
Middle District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.

JUDGMENT—December 5, 1962

This cause came on to be heard on the transcript of the  
record from the United States District Court for the  
Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for resubmission in order that the commissioners' reports may meet the standards prescribed in the opinion of this Court.

[fol. 125]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,345

D. C. Docket No. 792 Civil

UNITED STATES OF AMERICA, Appellant,  
versus

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA, and CAROLYN GAVIN GIBSON,  
ET AL., and UNKNOWN OTHERS, Appellees.

Appeal from the United States District Court for the  
Middle District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.

JUDGMENT—December 5, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for resubmission in order that

the commissioners' reports may meet the standards prescribed in the opinion of this Court.

[fol. 126] Petition for rehearing covering 9 pages filed December 20, 1962 omitted from this print. It was denied, and nothing more by order January 3, 1963.

[fol. 135]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 19,344

UNITED STATES OF AMERICA, Appellant,

v.

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
AND QUITMAN COUNTIES, STATE OF GEORGIA, and FRANK  
HUMBER, ET AL., and UNKNOWN OWNERS, Appellees,

AND

No. 19,345

UNITED STATES OF AMERICA, Appellant,

v.

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY  
COUNTY, STATE OF GEORGIA, and CAROLYN GAVIN GIBSON,  
ET AL., and UNKNOWN OTHERS, Appellees.

Appeals from the United States District Court for the  
Middle District of Georgia.

ORDER DENYING PETITION FOR REHEARING—January 3, 1963

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.

Per Curiam:—

It is Ordered that the petition for rehearing filed in the above stated and numbered cases be, and the same is, hereby Denied.

[fol. 136] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 850, October Term, 1962

2,872.88 ACRES OF LAND, etc., et al.; Petitioners,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office Supreme Court, U.S.  
FILED

FEB 21 1963

JOHN E. DAVIS, CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1962. <sup>3</sup>

Nos. ~~8~~ 79

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL., AND UN-  
KNOWN OWNERS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.**

W. LOWREY STONE,  
Counsel for Petitioners,  
Blakely, Georgia,  
JESSE G. BOWLES,  
Counsel for Petitioners,  
Cuthbert, Georgia,  
FORREST L. CHAMPION, JR.,  
Counsel for Petitioners,  
Post Office Box 1975,  
Columbus, Georgia.

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 19....**

**Nos. ....**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,**

**Petitioners,**

**versus**

**UNITED STATES OF AMERICA,**

**Respondent.**

**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL., AND UN-  
KNOWN OWNERS,**

**Petitioners,**

**versus**

**UNITED STATES OF AMERICA,**

**Respondent.**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.**

Petitioners, Hoke S. Lindsey (Tract No. H-805 et al.),  
A. J. Watson (Tract No. M-1306 et al.), and Carolyn  
Gavin Gibson, Edward M. Gavin, James F. Gavin, and  
Chester Gavin, Jr. (Tract No. B-201 et al.), pray that

the writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above cases on December 5, 1962, and the order denying the Petitioners' Petition for Rehearing entered in the above cases on January 3, 1963.

### **OPINIONS BELOW.**

The District Court rendered no opinion in the cases. It adopted the Commission's reports in the three cases. The opinion of the Court of Appeals for the Fifth Circuit (R. 114-123) reported at 310 Fed. 2nd 775 and a copy of the opinion is incorporated in the Appendix hereto, at page 38.

### **JURISDICTION.**

The judgments of the United States Court of Appeals for the Fifth Circuit were entered on December 5, 1962, and a copy of judgments are appended to this Petition in the Appendix at pages 49 and 51. Petitioners' Petition for Rehearing (Appendix, page 53) was denied by order of said Court on January 3, 1963, and a copy of the judgment denying the rehearing is likewise set forth in the Appendix hereto at page 61. On January 15, 1963, the Court of Appeals for the Fifth Circuit entered an order granting a stay of the mandate of that Court for a period of sixty (60) days from that date to enable Petitioners to apply for a writ of certiorari from this Court. A copy of the order granting this stay is set forth in the Appendix hereto at page 63. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### QUESTIONS PRESENTED.

(a) Succinctly stated, whether a master is required to state what evidence he credited or discredited, but expressed in the terms and circumstances of the case, it is whether adequate findings of fact under Rules 52.(a) and 53 (e) (1) (2) of the Federal Rules of Civil Procedure require a condemnation commission appointed under Rule 71A (h) affirmatively to find which evidence it credited and which evidence it discredited, the degree to which it based its findings upon opinions based on knowledge of comparable sales, whether particular evidentiary sales were truly comparable, whether its ultimate award of value was based on comparable sales, or on opinion evidence, or whether its award was a scaling down of an opinion based on a claimed misconception of market value, where the commission's reports contained a summary of the evidence, and express findings of the highest and best use of the land, both before and after the taking as ordinary farm land, value of land taken in fee, severance damage, value of easements, and total just compensation, and that market value at time of taking governed, when the cases involved the single use of farm land, and no underlying factor materially affecting the ultimate issue was involved, and the commission was given specific instructions by the Trial Court as to the rules of law applicable thereto, in order to permit an intelligent review by a Court of Appeals?

(b) (1) Whether particular inadequacies in such a commission's report must be specified by specific ob-

jections to the report under Rule 53 (e) (2) in order to present a question for review by a Court of Appeals? and, (2) where no claim of excessiveness is made, is the failure to make findings, if normally required, harmless error? and,

(c) Whether a Court of Appeals in remanding a case for additional findings should specify the particular inadequacies on which findings must be made.

### **STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.**

The Federal Rules of Civil Procedure involved are Rules 52 (a), 53 (e) (1) (2) and 71A (h) which are set forth verbatim in the Appendix hereto at page 35.

### **STATEMENT.**

Respondent filed actions to condemn the lands of Petitioners along with others. The District Court referred all of the cases to a Commission (R. 18) under specific instructions. (R. 21.) No objections or exceptions were taken to this order by any party. The Chairman of the Commission was an experienced attorney. (R. 25.) The Commission visited each tract to view the lands condemned. The Commission entered their reports after conducting full-scale court trials of the issue of just compensation. These three cases involved ordinary farm land. No other use was involved under the evidence. The only unusual features involved in the three cases which could have materially affected the ultimate finding of just compensation:

(1) In the *Lindsey* case, where the landowner contended for severance damage to his homeplace located several miles from the tract taken as to which the Commission made an express finding rejecting this contention. (R. 38, Finding of Fact No. 3), and

(2) The contention of the landowner in the *Watson* case that the land was valuable for subdivision purposes which also was expressly rejected by the Commission. (R. 43.)

The reports of the Commission (R. 32-40, *Lindsey* case; 41-49, *Watson* case; and 89-99, *Gibson* case) contain a summary of the evidence for both parties, Findings of Fact including highest and best use, severance damage, fair market value of land taken and flowage and other easements and sum total of just compensation, and concluded that the fair market value of land taken at time of taking was the standard for determining just compensation. Pursuant to Rule 53 (e) (2), Respondent filed objections to the reports (R. 50, 52, 100) complaining that the reports did not "contain sufficient findings as to the matters on which the Commissioners based their valuation", and that the awards were "excessive, outside the range of proper testimony", and "outside the range of market value and therefore clearly erroneous". The District Court adopted and approved the reports. (R. 55, 56, 102.) Respondent subsequently on appeal specified as error the District Court's "approving . . . the reports of the Commissioners when the findings were inadequate to determine the basis on which the awards were made",

and "when the reports themselves show that there were conflicts in the evidence but do not show how the Commissioners resolved them in making the awards". (R. 108), thereby abandoning the claim of excessiveness. The Court of Appeals reversed the judgments and remanded the cases for resubmission in order that the reports might meet the standards prescribed in its opinion, namely, that the Commission find which evidence it credited and which evidence it discredited. There were conflicts in the evidence in each case as would be expected in any trial, but *only* in the witnesses' opinions of fair market value. Each of the Petitioners introduced sales which they contended to be comparable as independent evidence; Respondent introduced evidence of sales which it contended to be comparable only as a supporting basis for their expert's opinion of fair market value. The only conflicts in position between Petitioners and Respondent during the trials were. (1) conflicts in opinion of market value, and (2) conflicts as to whether sales introduced in evidence by Petitioners were comparable.

The only questions before the Court of Appeals for the Fifth Circuit were:

- (1) Whether the general objection to the Commissioner's awards, namely, that the reports did not contain sufficient findings as to the matters on which the Commissioners based their valuation was sufficiently specific to raise any question for review, particularly where no complaint was made as to the

excessiveness of the awards. The opinion of the Court of Appeals did not decide this question but assumed that this general objection was sufficient.

(2) Whether the findings of fact were sufficient to sustain the judgments or whether the judgments should be vacated and the cases remanded for more specific findings. The Court of Appeals, while noting no specific inadequacy of the findings of fact, made general observations which it concluded rendered the findings inadequate to permit an intelligent review. (R. 116-117, 121-122, see fourth, ninth and tenth paragraphs of Opinion.)

Petitioners' Petition for Rehearing was denied on January 3, 1963. Petitioners then filed this application within the time provided by law.

### **REASONS FOR GRANTING THE WRIT.**

1. **Proper Construction and Application of Rules 52 and 53 to Condemnation Commissions Is Clear and Impelling Reason For Grant of Writ.**

This Court has granted certiorari in several cases involving the construction and application of the Federal Rules of Civil Procedure. With the tremendous number of condemnation cases now filed by the United States, a clear ruling by this Court on what constitutes adequate findings of fact by a condemnation commission would (a) resolve conflicts in principle and application of these rules in lower court federal decisions,

(b) greatly enhance the utility of a commission for expeditious determination of condemnation suits, and (c) put to rest the question of whether Rule 52 requires a judge or master to make findings on the evidence in order to permit intelligent review. We have found no decision of this Honorable Court on the particular questions presented. While this Court in *Kelley v. Everglades Drainage District*, 319 U.S. 45 (4), 63 S. Ct. 1141, held that the nature and degree of exactness of findings depends on the circumstances of the particular case and delusive exactness is not required, the opinion of the Fifth Circuit Court of Appeals has held that a commission, in the simplest of condemnation cases, with only evidentiary conflicts in opinions of value, must in its findings indicate the very evidence on which it based its award and how it reached its decision. This holding is an extreme interpretation of Rules 52 and 53, unsupported by reason or authority, which casts a cloud upon the purport and application of these rules.

**2. Opinion Is In Head-On Conflict With Decisions of the Court of Appeals for the Ninth and Tenth Circuits On Identical Question; Is Contrary to Decisions Within the Court of Appeals for the Fifth Circuit, and Is Opposed to Numerous Decisions of Other Circuits.**

(a) Findings as to component elements, not evidence, of ultimate issue is contemplated by Rules 52 (a) and 53 (e) (2).

At the outset, we recognize there may be cases requiring express findings on underlying facts which are

of the essence of, and upon which, an ultimate fact or issue depends, without which an intelligent review under the clearly erroneous rule could not be reasonably performed. Such cases are *Kelley v. Everglades Drainage District*, 63 S. Ct. 1141, 320 U. S. 214 in which there was no determination of the priorities of different classes of creditors to different sources of revenue, and the extent to which each class was entitled to participate in each source so that the ultimate fairness of the plan of reorganization could not be tested; and *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 A.S. Ct. 1190, in which this court held that an unelaborated conclusory finding of a "gift" which was the ultimate issue did not comply with the requirements of Rule 52 (a) since it did not give the reviewing Court any indication whether the trial court reached that conclusion because (a) of the form of the resolution authorizing the transfer, or (b) the absence of legal consideration was conclusive, or (c) some other reason. It is well settled that a gift involves the component elements of donative intent, delivery and acceptance and Rule 52 (a) requires a finding on subsidiary or underlying facts which are of the essence of the ultimate fact conclusion by the trial court. This case required a finding on an element of the ultimate issue; not a finding on the evidence which led to the conclusion as to this underlying element of the ultimate issue.

(b) Decision is directly contra to Ninth and Tenth Circuit decisions on identical question.

The opinion sought to be reviewed recites (R. 120) that it is at variance with the view adopted by the Court of Appeals for the Tenth Circuit in *United States v. Merz*, 306 F. 2d 39, (3) (4), pp. 41-43 (July, 1962), where that Court, in a case almost identical with the instant cases, rejected the identical general contentions of Respondent made in the instant cases. It is manifest that this is so from a reading of the facts set forth in that decision.

The opinion sought to be reviewed then seeks support in the decision of the Court of Appeals in *United States v. Lewis*, (July, 1962) 308 F.2d 453, 458, which required specific findings of the highest and best use of the land taken, where the evidence showed a conflict as to whether it was more valuable for (1) agricultural purposes, or (2) sand and gravel deposit, and how the sand and gravel deposit was figured in determining the value of the land. The Ninth Circuit followed the closely analogous decision of the Court of Appeals for the Fourth Circuit in *United States v. Carroll*, (June, 1962) 304 F. 2d 300, in arriving at its decision. The latter decision of the Fourth Circuit followed its previous decision in *United States v. Cunningham*, (1957) 246 F. 2d 330.

The case of *U.S. v. Lewis*, 308 F. 2d, 453, upon which the Fifth Circuit Court of Appeals relied, is distinguishable. There, the evidence showed a conflict of position by the parties as to the highest and best use of the land, namely, whether the sand and gravel deposit contributed to the market value of the land. No finding was had as to this material conflict of position which required a

subsidiary finding, since it materially affected the ultimate issue of value.

The same distinction applies to *United States v. Cunningham*, (4th, 1957) 246 F. 2d 330, *Cunningham v. United States*, (4th, 1959) 270 F. 2d 545 (multiple uses), *United States v. Bell County*, (5th, 1958) 259 F. 2d 23 (consequential benefits), *United States v. Leavell & Ponder, Inc.*, (5th, 1961) 286 F. 2d 398 (need for replacing cash reserves for short-lived equipment in a complex Wherry-Housing lease condemnation) and *United States v. Buhler*, (5th, 1958) 254 F. 2d 876 (multiple uses and demand for peculiar property, namely an airfield). We note that this distinction was adopted by the Ninth Circuit in *Merz*, 306 F. 2d 39, 42-43.

In the instant cases the reverse is true. There was no conflict as to the highest and best use of the land, and under the *Kelley* case, *supra*, no necessity for subsidiary findings to permit an intelligent review under the clearly-erroneous rule.

The opinion sought to be reviewed (R. 120) quotes the Ninth Circuit's conclusion in the *Lewis* case, *supra*, stating that it agreed with the Fourth Circuit's decision in the case of *United States v. Cunningham*, 246 F. 2d 330, which was a rejection of the contention that no findings of fact are required in a condemnation commission report, and not a holding that such a commission in its report must state what evidence it credited and what evidence it discredited.

What the Court of Appeals for the Fifth Circuit overlooked or ignored was the decision of the Ninth Circuit Court of Appeals in the cases of *United States v. Benning* and *United States v. Morrison*, (July 10, 1962) 308 F. 2d 453, at 460, which cases, like the instant cases, dealt with a single highest and best use, and which decision again rejected the identical contentions made by Respondent in the instant cases, but which the opinion of the Fifth Circuit adopts as sound. The decision in the last cited cases is in entire accord with the *Merz* case, *supra*. Its language is so significant that we beg the Court's indulgence to quote its fluent language, particularly since the Fifth Circuit chose to ignore the impact of the holding. (R. 131.)

"(7) The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose what proof the commission relied on and why the commission chose to believe certain witnesses and accept certain evidence as more credible than other witnesses and other evidence. Findings need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient."

*United States v. Lewis*, 308 F. 2d 453, 460.

The case upon which the Court of Appeals for the Fifth Circuit cites in its support itself repudiates the very holding made in the instant cases.

### 3. Decision is Contrary to Other Decisions of Court of Appeals for the Fifth Circuit.

In requiring finding as to what evidence was credited and discredited, the decision sought to be reviewed is contrary to the following decisions of the same Court construing and applying Rules 52 (a) and 53 (e) (2).

"(8, 9) The Government complains that the Commission and the court failed to make explicit findings with respect to a number of questions which it asserts are decisive. The Commission found that there was a dispute as to termite damage and that such damage was inconsequential at the time of taking. The finding is challenged and the Government contends that the Commission committed error in failing to include in its appraisal computation an amount for termite control. The Government asserts that there must be a reversal because the Commission concluded that leasehold furniture should be regarded as a short-lived facility, beneficial to the utilization of the leasehold, and consideration should be given to its effect on the gross income from the leasehold and to the financial burden of necessary replacements. In the consideration of these and other contentions of the Government, we must not forget that the ultimate determination is to be of an amount to be awarded as just compensation to the owner of property taken by the sovereign. The measure of the award is in many, perhaps most, instances based upon opin-

ions. The amounts to which the expert appraisers testify, the amount fixed by jurors or commissioners, and the amount determined by the court are all opinions and, as has been said, an informed guess. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L.Ed. 336. The judicial determination of the award in a condemnation case cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula. *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L.Ed. 1392. We do not think it is necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record. Cf. *Seale v. United States*, 5 Cir., 1957, 243 F.2d 145. We do not believe that the court omitted findings on any essential factual issues so as to prevent this Court from determining whether the result was based upon clearly erroneous findings." (Emphasis ours).

*United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 606, 5th Cir., 1961.

"A trial court may not be put in error for failure to reveal the method employed in calculating the amount of damages awarded since the method of assessing unliquidated damages in any case is not required to be revealed by a trier of facts, either court or jury." (Emphasis ours.)

*Ginsberg v. Royal Ins. Co.*, 179 F.2d 152 (3), 5th Cir., 1950.

"Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired."

*The Travelers Insurance Company v. Dunn*, 228  
F 2d 629, 630 (1), 5th Cir., 1956..

"(1-3) We have no means of knowing the basis of the judgment, whether the district court found unseaworthiness or negligence or both, or in what either or both consisted."

*Victory Towing Company, Inc. v. Bordelon*, 219  
F 2d 540, 541, 5th Cir., 1955.

This case best illustrates what Petitioners' contend are "underlying facts" on which findings are required, as contrasted with findings on evidence or reasoning thereupon or the process by which a trier of fact arrives at its conclusion, which are not required to set forth in findings.

"In action to recover unpaid balance upon agreed purchase price for capital stock of transportation line sold by plaintiffs, wherein defendants contended corporation was insolvent when sold, contrary to representation of solvency, finding of solvency was sufficient, *without* statement of assets and liabilities going to illustrate solvency. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A.

"In action to recover unpaid balance upon agreed purchase price for capital stock of transportation line sold by plaintiffs, wherein defendants alleged plaintiffs made certain fraudulent representations, finding that fraudulent representations were not made as alleged would be sufficient *without* referring to each separate representation and making subsidiary findings as to it. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A.

"Federal district court need not make findings on all facts presented nor make detailed evidentiary findings, nor make findings asserting negative of each issue of fact raised, and ultimate test as to adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for decision and are supported by evidence. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A." (Emphasis ours.)

*Weber v. McKee*, 215 F 2d 447, 448 (4) (5) (6),  
5th Cir., 1954.

"Oral findings that plaintiff, who brought suit against the government under the Federal Tort Claims Act, had a pre-existing defect in the formation of his lower back, and that such condition was aggravated at time of collision, and that he was permanently partially disabled, were sufficient to provide a basis for award of damages, and did not violate rule requiring special findings, even though no special findings were made with regard to plaintiff's other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A.

"The findings of fact were stated orally at the trial. No exception has been taken to the form in which the findings were made. These findings, the Government contends, violate Rule 52 (a). Fed. Rules Civ. Proc. 28 U.S.C.A. in that no special findings were made with regard to Jacobs' other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. We think the findings are ample to provide a basis for the decision. Kelley

v. Everglades Drainage District, 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485, 1486; Weber v. McKee, 5th Cir. 1954, 215 F.2d 447. This being so, we see no error."

*United States v. Jacobs*, 308 F.2d 906 (2) 907, 5th Cir., 1962.

"Where only issue on appeal was one of fact, and reviewing court could not determine that judgment of trial court approving findings of special master was clearly erroneous, judgment would be affirmed."

*Leonard M. Bernes v. Edward J. Henning*, 310 F.2d 127, 5th Cir., 1962.

It appears, therefore, that the different views on the requirements of Rules 52 (a) and Rule 53 (e) (2) even within the same Court make for inconsistent results. Petitioners respectfully submit this fact as an additional reason for the grant of the writ.

#### 4. Decision Is Contrary to the Weight of Authority of Other Circuits in Requiring Detailed Evidentiary Findings.

In addition to cases of the Ninth and Tenth Circuit decisions, and the Fifth Circuit decisions above cited, which are contrary to the decision sought to be reviewed, numerous other Circuits affirm the general rule that findings under the Rules do not require a Court to state whether it credited or discredited evidence or to set forth the process by which it arrived at its ultimate finding. Particularly is this rule applicable to

findings of unliquidated damages, or fair market value which is at most "an informed guess" and is not and cannot be fixed by any definite formula, as this Court has stated. The following authorities sustain the principles that (1) detailed evidentiary findings are not required, and findings on the ultimate issues are sufficient when there is no peculiar underlying fact or issue which materially affects the ultimate judgment, and (2) a trier of fact is not required to reveal the method used by it in arriving at the ultimate award.

### FIRST CIRCUIT.

1. *United States v. Grigalauskas*, (1st, 1952) 195 F. 2d 494 (3, 4) 498.

### SECOND CIRCUIT.

1. *Petterson Lighterage & Towing Corporation v. New York Central R. Co.*, (2nd, 1942) 126 F.2d 992 (5, 6) 996, 997.

2. *A. B. Dick Co. v. Marr*, (2nd, 1946) 155 F. 2d 923 (10) 924.

3. *United States v. Vater*, (2nd, 1958) 259 F. 2d 667 (8) 668.

### THIRD CIRCUIT.

1. *United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N.Y., et al.*, (2nd, 1945) 147 F. 2d 351 (1) (5) 352.

2. *Hartford-Empire Co. v. Shawkee Mfg. Co., et al.*, (3rd, 1944) 147 F. 2d 532 (3) (4) (5) 533.

3. *O'Toole v. United States*, (3rd, 1957) 242 F. 2d 308 (4) 310.

4. *Blumenthal v. United States*, (3rd, 1962) 306 F. 2d 16 (1).

#### FOURTH CIRCUIT.

1. *Knapp v. Imperial Oil & Gas Products Co.*, (4th, 1942) 130 F. 2d 1 (3).

2. *United States v. Pendergrast*, (4th, 1957) 241 F. 2d 687 (1-4) (5) 689.

3. *Cunningham v. United States*, (4th, 1959) 270 F. 2d 545, 550.

#### SIXTH CIRCUIT.

1. *Huszar v. Cincinnati Chemical Works, Inc.* (6th, 1949) 172 F. 2d 6 (1).

2. *Elam v. United States*, (6th, 1958) 250 F. 2d 582 (2).

#### SEVENTH CIRCUIT.

1. *Toledo, P & W R. R., et al. v. Peoria & P. Union Ry. Co.*, (7th, 1934) 72 F. 2d 745 (5).

2. *Gay Games, Inc. v. Smith*, (7th, 1943) 132 F. 2d 930 (1).
3. *Shapiro v. Rubens*, (7th, 1948) 166 F. 2d 659 (19) 661.
4. *Oedekerck, et al. v. Muncie Gear Works, Inc.*, (7th, 1950) 179 F. 2d 821 (1).
5. *Norwich Union Indemnity Co. v. Haas, et al.*, (7th, 1950) 179 F. 2d 827 (8) (9) 828.
6. *Life Savers Corporation v. Curtiss Candy Co.*, (7th, 1950) 182 F. 2d 4, 7.

#### EIGHTH CIRCUIT.

1. *McGee v. Nee*, (8th, 1940) 113 F. 2d 543 (5) 546.
2. *Brown Paper Mill Co., Inc. v. Irwin*, (8th, 1943) 134 F. 2d 337 (1).
3. *Skelly Oil Co. v. Holloway, et al.*, (8th, 1948) 171 F. 2d 670 (1).

#### NINTH CIRCUIT.

1. *Carr v. Yokohama Specie Bank, Limited, of San Francisco, et al.*, (9th, 1952) 200 F. 2d 251 (3) (4) (5).

#### TENTH CIRCUIT.

1. *Trentman v. The City and County of Denver, Colorado*, (10th, 1956) 236 F. 2d 951, 953.

2. *United States v. Horsfall*, (10th, 1959) 270 F. 2d 107 (5).

### DISTRICT OF COLUMBIA.

1. *Klimkiewicz v. Westminster Deposit & Trust Co., et al.*, (D.C., 1941) 122 F. 2d 957 (2) (3).
2. *Schilling, et al. v. Schwitzer-Cummins Co.*, (D.C., 1944) 142 F. 2d 82 (4) (5) (6), 84.

### SECONDARY AUTHORITIES.

1. *Moore's Federal Practice*, § 52.05-06, pp. 2643-2661.
5. **Decision Confuses Fact With Evidence, Is Illogical in Principle, and Impossible of Reasonable Application.**

The Advisory Committee which formulated Rule 52 stated that "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts".

The opinion sought to be reviewed confuses fact with evidence.

"Opinion evidence is not evidence of fact. The trier of fact is not bound to follow the expert."

*United States v. Honolulu Plantation Co.*, (9th, 1950) 182 F. 2d 172, 178.

The decision sought to be reviewed says in one breath that it is not necessary that every contested

issue be resolved by a separate finding of fact, and in the next breath says that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing Court that the ultimate award was "soundly and legally based". This is an erroneous statement of the rule. The true rule is that findings are necessary only to indicate the factual basis so as to determine if the ultimate judgment is clearly erroneous under the presumption of correctness.

Next, what evidence the trier of fact credited and discredited is not an underlying fact of the ultimate conclusion; it is the process by which it arrived at its conclusion. The same applies to the criticism that the reports did not indicate whether its ultimate conclusion was based on opinions that were based on comparable sales. Further, whether indicated sales were truly comparable is itself a conclusion from the evidence after weighing many factors and not the underlying factual basis referred to by this Court. Assuming that a particular sale is comparable to the tract being condemned, it does not follow that it is identical, and its weight is for the trier of fact, analogous to the credit or discredit of opinion evidence. Next, the decision prejudices the qualifications of the witnesses without the Court reading the transcript or the matter even being involved. Finally, the decision erroneously requires the Commission to state that it not give weight to what might be construed as a misconception of market value.

Findings upon the evidence do not constitute compliance with Rule 52 (a). It is not contemplated by this Rule.

"A discussion of portions of the evidence and the District Court's reasoning in its opinion do not constitute the special and formal findings by which it is court's duty appropriately and specifically to determine all issues presented, and are not a compliance with equity rule requiring fact findings and conclusions of law to be stated. Equity Rule 70-1/2, 28 U.S.C.A. following section 723." (Emphasis ours.)

*Interstate Circuit Inc. v. United States*, (1938) 304 U.S. 55, 58 S. Ct. 768 (3).

Neither does the rule require the assertion of each rejected proposition. *Schilling v. Schwitzer-Cummins Co.*, 142 F. 2d 82.

This Court stated in the *Kelley* case, *supra*, that the findings must indicate the "factual basis for the ultimate conclusion". Opinion evidence of value is not the "factual basis" to which this Court referred. Likewise the Petitioners' comparable sales in the *Lindsey* and *Gibson* cases (none introduced in *Watson* case) were only evidence of value, and not the underlying factual basis for the Commissioner's awards, as to which findings must be made. It was for the Commission to decide what weight should be given to the comparable sales evidence in the same fashion that it was their prerogative to weigh the opinion evidence of value, in conjunction with their visits to the land.

"The report of the commissioners indicated that a personal view of the lands had played an important part in arriving at what constituted a proper award. The weight to be given to this factor as against opinion evidence is exclusively for the trier of the facts." (Emphasis ours.)

*Rapid Transit Company v. United States*, (1961),  
295 F. 2d 465, 467.

Presumably, if the decision sought to be reviewed is correct, the Commission would be required in its findings to specify just what weight its views of the land played in their ultimate decision. This had not been heretofore held and we submit that such is an erroneous view.

The decision is illogical in principle, impossible in application and prescribes no definite standards by which a Commission might comply, assuming it were otherwise correct.

The error of the decision sought to be reviewed is all the more unreasonable in its application. It requires a commission to state that it believed witness X, that it disbelieved witness Y, and discredited witness Z some percentage. It must find that comparable sale X was comparable, sale Y was not comparable, sale Z was partially comparable. If the law requires this, then it must likewise require that the commission state why it believed one witness, and disbelieved another and discredited another by a certain percentage. This view overlooks the independence of the fact-finder to weigh the evidence and arrive at its own conclusion of

value. A commission may not, as such, discredit any witness or other evidence; its ultimate finding is generally an independent impression from all the evidence, derived from weighing all the evidence in the light of the commission's actual view of the land.

The opinion concludes that "in order that the commissioners' reports may meet the standards here prescribed, the judgments are reversed for resubmission to the commission". No standards are prescribed in the entire opinion. The opinion fails to point to a specific inadequacy, which is essential in order that the commission might comply therewith. Specific directions as contained in *U. S. v. Lewis*, 308 F. 2d 453, at page 458, are absent.

The opinion further erroneously requires a finding by the Commission that it did not base its opinion on a claimed incorrect theory of market value reflected by evidence admitted without objection, even in face of the express conclusion of law of the Commission that just compensation meant fair market value at time of taking, which was incorporated in Instructions to Commission. (R. 121-122.)

This is contrary not only to the Commission's express conclusion of law that "fair market value at the time of taking" must govern, but also unreasonably imputes to the Commission a violation of the Instructions given to them by the Trial Court. This is opposed to both reason, authority, the presumption of correctness of findings, and the established rules of construction of

findings reflected in numerous decisions, including a prior decision of the Court of Appeals for the Fifth Circuit. These authorities support the statement found in Moore's Federal Practice that:

"Findings of the trial court 'are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.'"

5 Moore's Federal Practice, pp. 2660, 2661.

To same effect, *The Travelers Insurance Company v. Dunn*, 228 F. 2d 629, 630 (1) (5th Cir., 1956).

Findings are presumptively correct.

"Fact that triers of fact totally reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions.

"Federal rule providing that findings of fact shall not be set aside unless clearly erroneous 'applies to appeals by the government as well as to those by other litigants. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A."

*United States v. Yellow Cab Co.*, 70 S. Ct. 177 (1) (2), No. 22, 1949.

To same effect: *Zimmerman v. Montour Railroad Company, Inc.*, 296 F. 2d 97 (2) (3) (4), 3rd Cir., 1961.

*Blumenthal v. United States*, 306 F. 2d 16 (1), 3rd Cir., 1962.

*Switzer Brothers, Inc. v. Locklin*, 297 F. 2d 39, 45,  
7th Cir., 1961.

*United States v. Foster*, 123 F. 2d 32 (1), 9th Cir.,  
1941.

*Glens Falls Indemnity Company v. United States*,  
229 F. 2d 370 (1) (2), 9th Cir., 1955.

*Stone v. Farnell*, 239 F. 2d 750, 752 (18) (19), 757,  
9th Cir., 1957.

*Stone v. Farnell*, 239 F. 2d 750, 757, 9th Cir., 1957.

The Commission made a summary of the evidence. It did not so much as mention the testimony referred to. (R. 122.) There is no basis for inferring that the Commission did not understand basic principles of eminent domain law. The opinion of the Court of Appeals does just that. A casual reference to the Commission's summary of the evidence that the Commission did set forth the evidence on which it based its award.

Next, the opinion holds that the reports are inadequate because they "did not indicate to what extent it gave credence to the opinions of witnesses, who, according to the summary of evidence given in the reports themselves, had little or no familiarity with" fair market value. (R. 117.)

Adequate findings of fact do not require that a Commission set forth the qualifications of each witness. No other case has gone that far. The opinion sought to be reviewed implies, in fact, holds to the contrary. No objection to any witness's testimony for lack of

qualifications to testify as to value was made. Had the Court of Appeals reviewed the transcript, which it obviously did not, (R. 122) it would have found ample qualifications for each particular witness. If the witness's opinion was subject to being stricken on motion as being based on an incorrect understanding of "fair market value", there was no complaint of any adverse ruling on any such motion. The basic error of the reasoning of the opinion is the refusal to apply the well-settled principles of law cited herein applicable to findings by a master.

**6. No Reviewable Question Was Presented by the Appeal, and Opinion Fails to Prescribe Standards by Which A Commission Might Comply With Demand for Findings.**

On the second question presented, there appears a conflict in the authorities as to whether specific objections to a master's report under Rule 53 (e) (2) are necessary to present a reviewable question. The only objection filed by Respondent and insisted upon on appeal was the objection that the report did not contain sufficient specific findings as to the matters on which the Commissioners based their valuation. This is no objection whatever. It points to nothing. It is so general that a trial court would be unable to determine to what insufficiency Respondent was referring. The Court of Appeals for the Fifth Circuit in the opinion sought to be reviewed did not refer to the point.

"Exceptions to a master's report should point out specifically the errors relied upon; and they need

not be considered if they are so broad as to amount merely to a denial of the facts and conclusions of the master, so as to require the court to rehear the entire case." (Emphasis ours.)

*Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon*, 151 U.S. 285 (3), 14 S. Ct. 343.

To same effect, *Coghlan v. South Carolina R. Co.*, 142 U.S. 101, 12 S. Ct. at 154.

"Master's findings cannot be reviewed upon appeal in absence of exceptions to his report and in absence of objections to court's approval of master's findings. Federal Rules of Civil Procedure, rule 53 (e) (2), U.S.C.A. following section 723c."

*Socony-Vacuum Oil Co. v. Oil City Refiners*, 136 F. 2d 470, 471 (17), 6th Cir., 1943.

To same effect, *Massachusetts Bonding & Ins. Co., v. Preferred Automobile Ins. Co.*, (6th, 1940) 110 F. 2d 764 (1). (2).

"It is not necessary to make objections to the master's findings as permitted by the rule. Fed. Rules Civ. Proc. rule 53 (e) (2), 28 U.S.C.A."

*Henry Hanger & Display Fixture Corporation of America v. Sel-O-Rak Corporation*, 270 F. 2d 635, 636 (11), 5th Cir., 1959.

"Objections to the master's report have been likened to special demurrers and to assignments of error in appellate proceedings, but in any event it is clearly established that they must specifically point out the errors complained of so as to raise well-defined issues for the court's consideration.

Since mere general objections would compel the court to review the whole case, and thus would defeat the very purpose of reference, such vague and general objections should be overruled."

*Moore's Federal Practice, Volume 5, pp. 2970, 2971, § 53.11.*

"The United States appears to urge upon us a sort of supervisory function in this respect and that we deal with the matter in the abstract. It invites us to look at the commission's reports in these cases; to observe that each upon its face fails to measure up to standard; to send the cases back with general instructions that adequate reports be made.

"This course we reject. If there be inadequacies in a particular report, they must be specified by objection to the report. If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations." (Emphasis ours.)

*United States v. Lewis, 308 F 2d 453 (2), 456.*

Neither Respondent's objections nor the opinion itself complies with the above quoted part of the *Lewis* case, *supra*, upon which the opinion to a great extent relies. It is for this additional reason clearly erroneous. The statements that:

"We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say,

however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based." (Emphasis ours.)

*Opinion, p. 8 (R. 121).*

leave the decision much more vague than the reports which it criticizes as fatally defective. The decision specifies no "subsidiary facts" to which it refers and we submit there are none. With due deference to the Court, Petitioners respectfully contend that the opinion and judgment, being a critic, while it need not be perfect, should, at least, point to specific inadequacies as required by the *Lewis* case, *supra*, so that a commission might comply therewith.

Further, the opinion ignores the prior holding of the Court of Appeals for the Fifth Circuit that it reviews the findings and judgment of the district court, not the Commission. *Parks v. United States*, 293 F. 2d 482 (2) (5th, 1961). The nature of the evidentiary findings sufficient to support the Court's decision are for the Trial Court to determine in the first instance in the light of the circumstances of the particular case. *Kelley v. Everglades Drainage District*, 319 U.S. 415, at 422. If the findings were adequate to enable the District Court to apply the clearly erroneous rule, then it would seem that Respondent's burden on appeal would be showing a manifest abuse of its review of the Commission's findings, or a specific harmful error in order to show reversible error.

On the merits, however, if the Court had followed the rules of law cited herein, it could have determined from the reports alone that the Commission's findings were within the range of competent evidence and not clearly erroneous. *Petitioners are entitled to no less.* Looking at the evidence recited in the reports under the presumption of correctness, the only conclusion that can be drawn is that the Commissioners (1) rejected the opinions of Respondent's witnesses and the purportedly comparable sales on which they were based, and (2) did not as such, accept the opinions of Petitioners' witnesses nor find Petitioners' sales to be identical, but arrived at their own independent findings, weighing the evidence in the light of their visits of the land taken. This the Commission had a right to do. The fact that the ultimate awards more nearly approximated the opinions of Petitioners' witnesses, and exceeded the amount initially deposited by Respondent is of no consequence. *Stephens v. United States*, (5th, 1956), 235 F. 2d 468 (7). The Commission's reports show how they resolved the conflicts in the testimony by their end result, as per Merz, reason, and generally accepted principles of law. The rules involved do not require a Commission to set forth the formula or method by which it arrived at its result, when actually there is no formula or method by which just compensation may be determined except fair and honest weighing of the evidence and adherence of the Commissioners to their oaths and the Instructions by the Trial Court.

**7. All General Recognized Bases for Grant of Writ Are Present in the Instant Cases.**

While there is no formula that governs this Court's grant of certiorari except its enlightened judicial discretion, we earnestly submit that this case presents special and important reasons for clarification of the law by this Court on a subject which has constant and recurring use. This Court has recognized that one of its primary functions is to resolve conflicts between decisions of Courts of Appeal so as to provide for uniformity of decision on issues of public consequence. The conflict within the decisions of the Court of Appeals for the Fifth Circuit on the subject is still an additional reason for its grant. The clearly erroneous and extreme interpretation of Rules 52 (a) and 53 (e) (2) is still a further reason. The proper interpretation and application of the Federal Rules of Civil Procedure which has daily application in all non-jury cases is such a subject as merits this Court's final say.

**CONCLUSION.**

For the reasons submitted above, it is respectfully submitted that the writ of certiorari should be granted.

W. LOWREY STONE,

JESSE G. BOWLES,

FORREST L. CHAMPION, JR.,  
Attorneys for Petitioners.

**CERTIFICATE OF SERVICE.**

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1963, I served copies of the foregoing Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit on the United States of America, Respondent, as follows:

1. By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,  
Assistant Attorney General,  
Washington, D. C.,

Messrs. S. Billingsley Hill and Hugh Nugent,  
Attorneys, Department of Justice,  
Washington, D. C.,

Mr. Floyd M. Buford,  
United States Attorney,  
Macon, Georgia.

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

Attorney for Petitioners,  
Post Office Box 1975,  
Columbus, Georgia.

**APPENDIX.****RULE 52—FINDINGS BY THE COURT.**

(a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948.

**RULE 53—MASTERS.****(e) REPORT.**

(I) **Contents and Filing—**The master shall prepare a report upon the matters submitted to him by the order

of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(II) In Non-Jury Actions—In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

#### RULE 71A—CONDEMNATION OF PROPERTY.

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a

trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

38.

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 19344**

**UNITED STATES OF AMERICA,  
Appellant,**

**versus**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,**

**Appellees,**

**AND**

**No. 19345**

**UNITED STATES OF AMERICA,  
Appellant,**

**versus**

**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL., AND UN-  
KNOWN OTHERS,**

**Appellees.**

**Appeals from the United States District Court for the  
Middle District of Georgia.**

**(December 5, 1962)**

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge,  
and JOHNSON, District Judge.

TUTTLE, Chief Judge: These appeals by the United States from District Court judgments approving valuation awards of condemnation commissioners present the question whether the reports of the commissioners were sufficiently detailed as to findings of fact, and in giving the basis on which they were bottomed to permit adequate review by the district court, and thereafter by this Court.

These condemnation suits are a part of a program of land acquisition for the Walter F. George Lock and Dam project on the Chattahoochee River in Georgia and Alabama. The three series of tracts involved are all tracts of ordinary farm, timber and pasture land. While the government requested a jury trial, it does not now contend that the submission of the issues to commissioners by the trial court constituted reversible error. Neither does the government, on the record before us, assign any specific error in the hearings before the commissioners as a basis for attacking the judgment of the district court in affirming the report of the commissioners. Instead, the government takes the position that the reports of the commissioners are in such general and vague terms as to make it impossible for the district court or for this Court on appeal to determine whether the commissioners' ultimate conclusions of value were based on legally correct principles or on legally sufficient evidence.

The appellees here, first, claim that the Court of Appeals cannot take notice of the government's appeal, because it does not expressly contend that the awards are excessive. They take the position, therefore, that any claim by the government that there was error in the form or substance of the commissioners' reports falls within the "harmless error" rule of the Federal Rules of Civil Procedure, Rule 61 F.R.C.P. We think this contention is without merit. It is apparent from the findings of the commissioners that the awards made by them and approved by the trial court are substantially in excess of the amounts deposited in court upon the declaration of taking. It thus appears that if errors occurred in the proceedings below, as a result of which judgments were awarded in excess of the amounts contended for by the United States, such errors would not be harmless in the sense of the Rule.

In general, the report of the commissioners recited the substance of the valuation testimony given by the several witnesses tendered by the landowners, on the one hand, and by the government on the other, and they made ultimate findings of the market value of the property taken and of severance damages to lands not taken and make certain specific findings as to the value of easements and fences taken, or the cost of fencing the remaining tracts. The reports did not in any manner whatever indicate which evidence the commission credited and which evidence it discredited. The reports gave no indication as to the degree to which it based its findings upon those opinions that were based

on knowledge of comparable sales, nor did they give any indication as to whether indicated sales were truly comparable. The reports did not indicate to what extent it gave credence to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case.

Part of the basis for this Court's repeatedly stating that the trial of condemnation valuation issues is typically for a jury, and the appointment of commissioners is proper only in the exceptional case, *United States v. Buhler*, 5 Cir., 254 F. 2d 876, *United States v. Leavell & Ponder, Inc.*, 286 F. 2d 398, 408, *United States v. Buhler*, 5 Cir., 305 F. 2d 319, 331, is that where a trial is had before a jury, the trial judge is charged with the responsibility of determining the qualifications of so-called expert witnesses and of others who undertake to express opinions as to land values and to determine initially whether so-called "comparable sales", about which witnesses propose to testify, are sufficiently comparable to justify their consideration by the fact-finder, and because, further, the trial judge is able, by correctly charging the jury, to point out the defects and weaknesses in the testimony of interested parties to the proceedings, such as the owners of the land involved, and to stress the importance, as courts have always done, *Baetjer v. United States*, 1 Cir., 143 F. 2d 391, 397; *International Paper Co. v. United States*, 5 Cir., 227

F. 2d 201, 208; *United States v. Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, 407, cert. denied 366 U. S. 944, of opinion evidence based on comparable transactions. In a trial to a jury under such supervision by a trial judge, it can well be understood why a general verdict of value, plus a general verdict of severance damages can suffice, whereas a hearing before a commission must result in findings much more detailed than a general verdict.

The Courts of Appeals of the several circuits are not of a uniform mind as to this, but we find ourselves fully in accord with the reasoning of the Court of Appeals for the Fourth Circuit in *United States v. Cunningham*, 4 Cir., 246 F. 2d 330, 333, where it is said:

"The very reasons which justify the appointment of the commission, however, demonstrates the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an

adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them 'unless clearly erroneous' (Rule 53(e) (2) ), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings."

This Court has expressly approved this language of the Fourth Circuit in *United States v. 2,477.79 Acres of Land in Bell County*, 5 Cir., 259 F. 2d 23, where on page 29, we said:

"We find ourselves in agreement with the Government's position that the findings of the commissioners are wholly inadequate and that the judgment must be vacated and the cause remanded for proper findings and a judgment based thereon. From the report, so styled, of the commissioners nothing appears except a recital of their appointment, a statement that a hearing was had, and the commissioners' conclusions as to values. As examples of the deficiencies in the findings it may be noted that nothing is found as to how the commissioners resolved the conflicts in the testimony, no findings appear as to the uses of the land particularly Tract 805, and no determination is made

as to benefits. Without explicit findings the trial court cannot adopt or reject the findings or adopt some and reject others. Without adequate findings this Court does not have before it a record which permits of a review of the district court's adjudication. *United States v. Buhler*, supra; *United States v. Cunningham*, 4 Cir., 1957, 246 F. 2d 330." [Emphasis added.]

We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States v. Merz*, 10 Cir., 306 F. 2d 39. Our view in this respect is in accord with that of the Court of Appeals for the Ninth Circuit, which has recently reversed judgment of a trial court in California which expressly stated that in a condemnation case, the Commission's finding "may be as general as the verdict of a jury, and have the same effect". In its judgment reversing this decision the Court of Appeals in *United States v. Lewis*, 9 Cir., No. 17,437, dec. July 10, . . . F. 2d . . . said:

"Upon this basic difference we agree with the principles expressed in *Cunningham*. The district judge is not sitting as the presiding judge in a jury-tried case, but as a reviewing court. He has not heard the evidence nor supervised its admission and thus is in no position to view the commission's report simply as a jury verdict. If the court is intelligently to perform a function of review, it must be able to ascertain whether, in arriving at its value judgment, error was committed by the commission, either in the

resolution of factual disputes or in the application of principles of valuation. There must be a sufficient disclosure to the reviewing court to enable it to understand what it is that has been decided. As stated by Mr. Justice Cardozo in *United States v. Chicago M. St. P. & P. Railroad*, 1935, 294 U. S. 499, 510-511:

"We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Although admittedly the scope of review, either by the trial court of the commissioners' findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based. It is too obvious to require argument that in determining market value the best test is what the same or similar property is selling for in the locality at or near the day of taking. Thus, it is universally recognized that the best test of market value is the data concerning comparable sales. On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion

as to whether the sales sustain a value of \$100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:

"I arrived at it like I'd price mine, just like it is; that's what it would take to buy mine adjoining Hoke's."

If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value.

This Court has held that in an appeal from a judgment of the trial court where the valuation finding has been made by commissioners, it is the function of the trial court to determine whether the commission's findings are to be approved or are to be reversed, under the clearly erroneous standard. *United States v. Twin City Power Company of Georgia*, 5 Cir., 253 F. 2d 197, 204. It is then the function of this Court to determine whether the district court's disposition of the commission's findings was clearly erroneous.

In order that the district court may perform its function, it must be able to determine whether the commission adopted the correct legal principles, and whether the evidence before the commission met the standard of substantiality to withstand a reversal by the district

court. As we said in *United States v. Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, at page 406, "The figure arrived at by the commissioners would much better have been supported by subsidiary findings of fact. . . . Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum."

Furthermore, while we do not even suggest the need for long findings or long reports merely for the sake of length, there is much to be said for the view that commissioners like trial judges may be expected to give more careful consideration to the subsidiary facts and the legal principles involved if they are required to be stated in the report. The language of the opinion of the Court of Appeals for the Second Circuit, in *United States v. Forness*, 2 Cir., 125 F. 2d 928, at page 942 is here apposite:

"It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."

In order that the commissioners' reports may meet the standards here prescribed, the judgments are REVERSED and the cases are REMANDED to the trial court for resubmission.

A true copy.

Test: EDWARD W. WADSWORTH,  
Clerk, U. S. Court of Appeals,  
Fifth Circuit,  
By CLARA R. JAMES,  
Deputy.

(Seal)

Jan. 16, 1963.

New Orleans, Louisiana

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**October Term, 1962**

**No. 19,344**

**D. C. Docket No. 789 Civil**

**UNITED STATES OF AMERICA,**

**Appellant,**

**versus**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,**

**Appellees.**

**Appeals from the United States District Court for the  
Middle District of Georgia.**

**Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.**

**JUDGMENT.**

**This cause came on to be heard on the transcript of  
the record from the United States District Court for  
the Middle District of Georgia, and was argued by  
counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for re-submission in order that the commissioners' reports may meet the standards prescribed in the opinion of this Court.

Issued: December 5, 1962.

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**October Term, 1962**

**No. 19,345**

**D. C. Docket No. 792 Civil**

**UNITED STATES OF AMERICA,**  
**Appellant,**  
**versus**

**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL., AND UN-  
KNOWN OTHERS,**  
**Appellees.**

**Appeal from the United States District Court for the  
Middle District of Georgia.**

**Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and  
Johnson, District Judge.**

**JUDGMENT.**

**This cause came on to be heard on the transcript of  
the record from the United States District Court for the  
Middle District of Georgia, and was argued by counsel;**

**ON CONSIDERATION WHEREOF, It is now here  
ordered and adjudged by this Court that the judgment  
of the said District Court in this cause be, and the**

same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for resubmission in order that the commissioners' reports may meet the standards prescribed in the opinion of this Court.

Issued: December 5, 1962.

**UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT.**

**Nos. 19,344 and 19,345.**

**UNITED STATES OF AMERICA,**  
**Appellant,**

**versus**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL.,**  
**Appellees,**

**and**

**UNITED STATES OF AMERICA,**  
**Appellant,**

**versus**

**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL.,**  
**Appellees.**

**PETITION FOR REHEARING.**

Appellees in the captioned causes respectfully petition this Honorable Court for a rehearing of the Appeal in said cases, and respectfully suggest:

That the opinion rendered in said causes on December 5, 1962, is contrary to law, this Court having erred in the following respects:

1. In holding that a condemnation commission, under the Federal Rules of Civil Procedure, in the findings of fact of its award, must indicate, which evidence the commission credited, and which discredited.

2. In holding that such a commission in its report, must indicate the degree to which it based its findings upon those opinions that were based on knowledge of comparable sales.

3. In holding that such a commission in its report, must indicate in its findings of fact whether indicated sales were truly comparable.

4. In holding that such a commission in its report, must indicate to what extent it gave credence to the opinions of witnesses, who, according to the Court's statement, had little or no familiarity with ordinary ingredients generally considered by the Courts to be required to support an opinion of value, although no objections were made to the witnesses' qualifications to express an opinion of value; and the reports do not show or purport to show the witnesses' qualifications.

5. In holding that such a commission in its report must make sufficient findings of subsidiary facts (without specifying what subsidiary facts were involved as to require a specific finding) so that it will appear to the reviewing Court that its ultimate finding of value was soundly and legally based, in condemnation cases involving a single highest and best use, where such

use was specifically found, both before and after the taking, and which cases were the "most simple" of condemnation cases involving no exceptional features, or collateral questions which could have materially affected the ultimate finding of value.

6. In holding that such a commission in its report, where evidence of comparable sales was introduced, is required to find whether the comparable sales sustain its ultimate finding of value, for example, of \$100.00 per acre, or whether the value represents a scaling down of an opinion which may have been based upon an incorrect theory of market value; in other words, in holding that a commission in such a case must make a specific finding that it did not violate the instructions given it by the Trial Court, that it knew the meaning of market value which had been defined by said instructions; and that it recognized incorrect theory as incorrect; in holding that there must be a specific finding in such respects to enable the district court to determine whether the commission adopted the correct legal principles, that is, whether it followed the instructions given it by the district court; and in failing to recognize and apply the principles of law that (a) adequate findings of fact do not require the assertion of the negative of each rejected proposition; (b) that if any inference can be legitimately drawn from facts found to support the judgment, they will be so drawn; and (c) the presumption is that the commission followed the instructions of the Trial Court and the law; further, in overlooking conclusion of law No. 2 in the *Lindsey*.

case, (R. 40), conclusion of law No. 2 in the Watson case, (R. 48), and conclusion of law No. 2 in the Gibson case, (R. 98), as found in the reports of the commission which recognized that just compensation must represent the fair market value of all of the property taken as of the date of taking.

7. In failing to recognize and apply this Court's decision in *U. S. vs. Tampa Bay Garden Apartments, Inc.*, 294 F 2d 598, 606, wherein it was held that it is not necessary, in testing the district court's judgment by the clearly erroneous doctrine, to require a specific finding with respect to each of the evidentiary conflicts in the record.

8. In failing to recognize and apply the principles of law that findings of fact are required on only the essential factual issues, and a master under Rule 53 (e) (2) is not required to make findings that will present every possible view of the case, nor is a master required to make findings on every aspect of the evidence.

9. In failing to recognize the distinction between the instant simple condemnation cases where a single highest and best use of farming was involved, and was so found, and those cases, *U. S. vs. Cunningham*, 246 F 2d 330, 4th Circuit, 1957, *U. S. vs. Bell County*, 259 F 2d 23, 5th Circuit, 1958, *U. S. vs. Buhler*, 254 F 2d 876, 5th Circuit, 1958, *U. S. vs. Leavell and Ponder, Inc.*, 286 F 2d 398, 5th Circuit, 1961, *U. S. vs. Carroll*, 304 F 2d, 300, 4th Circuit, 1962, and *U. S. vs. Lewis*, 308 F 2d 453, 9th

Circuit, 1962, where multiple highest and best uses, consequential benefits, multiple uses and need for peculiar property, namely, an airfield, need for replacing cash reserves for short lived equipment, dual uses, and dual uses, respectively were involved requiring subsidiary findings, and where there was no specific subsidiary finding as to the highest and best use.

10. In failing to recognize and apply the holding of this Court in the case of *Ginsberg vs. Royal Insurance Co.*, (CA 5th, 1950) 179 F 2d 152 (2) (3), which was applicable and controlling and required a contrary decision to that rendered by the Court.

11. In failing to recognize and apply the ruling of the 9th Circuit, Court of Appeals, in the *U. S. vs. Benning* and *U. S. vs. Morrison* cases decided July 10, 1962, 308 F 2d 453 (7), at page 460, which rejected specifically the identical contentions made by Appellant in the instant cases but which were adopted by this Court, and which held that commission's findings and report were sufficient though not disclosing what proof the commission relied on and why it chose to believe certain witnesses and accept certain evidence as more credible than other witnesses and other evidence; and in misapplying the case of *U. S. vs. Lewis*, *supra*, as authority to support its decision which Appellees respectfully submit is distinguishable; and further on page 7 of this Court's opinion, in citing language from the *Lewis* decision, *supra*, which was in response to the Trial Court's decision in that case that no findings of

fact are required by a condemnation commission, and not in response or related to the contention that such a commission must point to the very evidence on which it based its award.

12. In failing to recognize and apply the rule that findings need be only as detailed as the nature of the subject of the case demands to afford a basis for decision and to enable this Court to apply the clearly-erroneous rule, under which rule the findings are sufficient, in the light of the simplicity of the factual issues involved.

13. In holding that the Appellant objections to the awards in the instant cases were themselves adequate to present a question for review when said objections fail to specify any particular inadequacy in said findings and said objections were altogether too indefinite to raise a question for review, and in overlooking the holding of the 9th Circuit Court of Appeals in *U. S. vs. Lewis*, (9th Circuit, 1962) 308 F 2d 453 (2) and at page 456, holding that objections to an award must point to a specific inadequacy of the findings in order to present a question for review.

14. In failing to recognize and apply the decision of *U. S. vs. Merz*, (10th Circuit, 1962) 306 F 2d 39 (3) (4), at pages 42-43, which is directly in point, and which authority is bottomed on the controlling cases of *Kelly v. Everglades Drainage District*, 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485, *Shapiro vs. Reubens*, (7th Circuit)

166 F 2d 659, 665, *U. S. vs. Pendergrast*, (4th Circuit, 241 F 2d 687, and *Cunningham vs. U. S.*, (4th Circuit) 270 F 2d 545, which require a contrary decision from that rendered by the Court.

15. Assuming that the decision of this Honorable Court were otherwise legally sound, the decision fails to particularize the specific inadequacies in the report in order that the commission might comply therewith. The Court's order reverses the judgments for resubmission to the commission in order that the reports might meet the "standards herein prescribed" but no specific standards are prescribed and no specific inadequacies or lack of findings of required specific subsidiary facts are set forth in the opinion which would enable a commission to comply therewith, as was done in the case of *U. S. vs. Lewis*, (9th Circuit, 1962) 308 F 2d 453, at pages 458-459.

For the foregoing reasons, Appellees respectfully request that a rehearing should be granted, and that this Honorable Court should revise its decision and affirm the judgment of the United States District Court for the Middle District of Georgia.

Respectfully Submitted,

W. LOWREY STONE,  
Blakely, Georgia,

JESSE G. BOWLES,  
Cuthbert, Georgia,

FORREST L. CHAMPION, JR.,  
Post Office Box 1975,  
Columbus, Georgia,  
Counsel for Appellees.

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I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

---

**CERTIFICATE OF SERVICE.**

I hereby certify that I have this 17th day of December, 1962, mailed a copy of the foregoing Petition for Rehearing in Cases Numbered 19,344 and 19,345, of the United States Court of Appeals for the Fifth Circuit to Counsel of record for Appellant.

FORREST L. CHAMPION, JR.,  
Of Counsel for Appellees.

[74 and 75]

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 19,344**

**UNITED STATES OF AMERICA,  
Appellant,  
versus**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,**

**Appellees,**

**AND**

**No. 19,345**

**UNITED STATES OF AMERICA,  
Appellant,  
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**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
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**Appellees.**

**Appeals from the United States District Court for the  
Middle District of Georgia.**

**(January 3, 1963)**

**ON PETITION FOR REHEARING.**

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge,  
and JOHNSON, District Judge.

**PER CURIAM:**

It is ORDERED that the petition for rehearing filed  
in the above stated and numbered cases be, and the  
same is, hereby DENIED.

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 19344**

**UNITED STATES OF AMERICA,**  
**Appellant,**  
**versus**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATED  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS;**

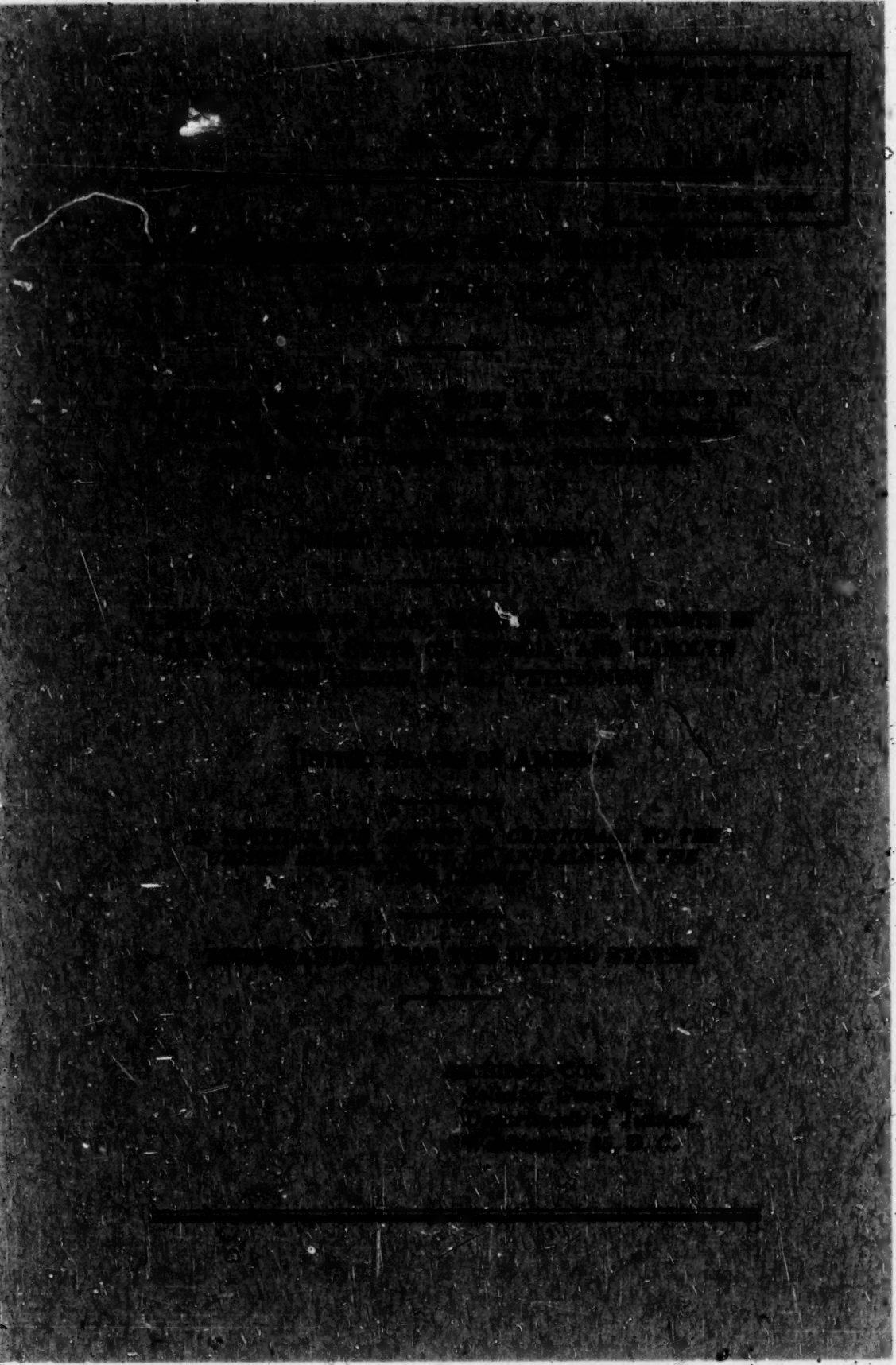
**Appellees.**

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from the date of this order, unless the abovementioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 15th day of  
January, 1963.

(S.) ELBERT P. TUTTLE,  
United States Circuit Judge.

(Original Filed January 15, 1963.)



**In the Supreme Court of the United States**

**OCTOBER TERM, 1962**

---

**No. 850**

**2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN  
CLAY AND QUITMAN COUNTIES, STATE OF GEORGIA,  
AND FRANK HUMBER, ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

---

**1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN  
CLAY COUNTY, STATE OF GEORGIA, AND CAROLYN  
GAVIN GIBSON, ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT**

---

**MEMORANDUM FOR THE UNITED STATES**

---

**This case presents questions relating to the sufficiency of the report of a commission awarding com-**

pensation in a land condemnation proceeding. The rule adopted by the decision below, which the United States supports, is that such commissions must file meaningful reports showing the facts found and the law applied in reaching an award. That holding, however, is in direct and avowed conflict with the decision of the Court of Appeals for the Tenth Circuit in *United States v. Merz*, 306 F.2d 39, from which the United States has petitioned for certiorari (No. 790, this Term). For the reasons more fully set forth in that petition, we think the questions presented are important and require resolution by this Court. Accordingly, we join in the request that the petition for certiorari in this case be granted.

Respectfully submitted,

ARCHIBALD COX,  
*Solicitor General.*

March 1963.

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**Supreme Court of the United States**

**OCTOBER TERM, 1962.**

No. **[REDACTED]** **79**

**2,872.88 ACRES OF LAND, ETC., ET AL.,**  
**Petitioners,**

**versus**

**UNITED STATES,**  
**Respondent.**

**On Writ of Certiorari to the United States Court of**  
**Appeals for the Fifth Circuit.**

**BRIEF FOR THE PETITIONERS.**

**W. LOWREY STONE,**  
**LOWREY S. STONE,**  
Blakely, Georgia,  
**JESSE G. BOWLES,**  
Cuthbert, Georgia,  
**FORREST L. CHAMPION, JR.,**  
Post Office Box 1975,  
Columbus, Georgia 31902,  
Counsel for Petitioners.

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**SUPREME COURT OF THE UNITED STATES.**  
**OCTOBER TERM, 1962.**

---

**No. 850.**

---

**2,872.88 ACRES OF LAND, ETC., ET AL.,**  
**Petitioners,**

**versus**

**UNITED STATES,**  
**Respondent.**

---

**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

---

**BRIEF FOR THE PETITIONERS.**

---

**OPINIONS BELOW.**

The District Court rendered no opinion in the cases. It adopted the Commission's reports in the three cases. The opinion of the Court of Appeals for the Fifth Circuit (R. 112-119) is reported at 310 F. 2d 775.

**JURISDICTION.**

The judgment of the Court of Appeals was entered December 5, 1962 (R. 119-120). The order of the Court

of Appeals denying the Petition for Rehearing was entered on January 3, 1963 (R. 121). The Petition was filed on February 21, 1963 and was granted April 22, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

### QUESTIONS PRESENTED.

1. Succinctly stated, whether a Master must expressly find what evidence he credited and what evidence he discredited.

Stated in the terms and circumstances of the case, however, it is whether a Master must affirmatively find, to permit intelligent review by an appellate court,

(a) qualifications of witnesses, (b) which evidence it credited and which it discredited, (c) whether it gave credence to opinions based on knowledge of comparable sales or to opinions of value of witnesses who allegedly had little or no familiarity with the concept of market value, (d) whether in rendering its award it gave credence to an opinion allegedly without probative value or whether it arbitrarily scaled down such an opinion, and (e) whether particular evidentiary sales were truly comparable to the lands taken.

when the Master was given express instructions by the Trial Court as to the applicable rules of law (R. 21-26) and the Master made a personal inspection and view of the lands and made a report summarizing the evidence and containing express findings "from the evidence as a whole" (R. 33, 42, 91) as to:

- (1) the highest and best use of the lands before and after the taking
- (2) the value of the land taken in fee
- (3) the severance damage to the remainder
- (4) the value of flowage and other easements
- (5) "fair market value" being the governing standard of its determination of value, and
- (6) total just compensation,

and the end result showed that the Master rejected the opinion evidence of witnesses for Respondent and arrived at its own independent determination of value from weighing all the evidence in the light of their visits to the land taken and the case was the simplest of condemnation cases involving ordinary farm land (R. 113) and no underlying factor materially affecting the ultimate issue of just compensation was presented?

2. (a) Whether particular inadequacies in such a commission's report must be specified by specific objections to the report under Rule 53 (e) (2) in order to present a question for review by a Court of Appeals? and, (b) where no claim of excessiveness is made, is the failure to make evidentiary findings, if normally required, harmless error? and,

3. Whether a Court of Appeals in remanding a case for additional findings should specify the particular inadequacies on which findings must be made.

4

## STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

The Federal Rules of Civil Procedure involved are Rules 52 (a); 53 (e) (1) (2), 71A (h), 46 and 61, and 63 Stat. 105, 28 U.S.C.A., § 2111.

### STATEMENT.

Respondent filed actions to condemn the lands of Petitioners along with others. The District Court referred all of the cases to a Commission (R. 18) under specific instructions. (R. 21.) No objections or exceptions were taken to this order by any party. The Chairman of the Commission was an experienced attorney. (R. 25.) The Commission visited each tract to view the lands condemned. The Commission entered their reports after conducting full-scale court trials of the issue of just compensation. These three cases involved ordinary farm land. No other use was involved under the evidence. The only unusual features involved in the three cases which could have materially affected the ultimate finding of just compensation:

(1) In the *Lindsey* case where the landowner contended for severance damage to his homeplace located several miles from the tract taken as to which the Commission made an express finding rejecting this contention. (R. 38, Finding of Fact No. 3), and

(2) The contention of the landowner in the *Watson* case that the land was valuable for subdivision pur-

poses which also was expressly rejected by the Commission. (R. 43.)

The reports of the Commission (R. 32-40), Lindsey case; 41-49, Watson case; and 89-99, Gibson case) contain a summary of the evidence for both parties, Findings of Fact including highest and best use, severance damage, fair market value of land taken and flowage and other easements and sum total of just compensation, and concluded that the fair market value of land taken at time of taking was the standard for determining just compensation. Pursuant to Rule 53 (e) (2), Respondent filed objections to the reports (R. 50, 52, 100) complaining that the reports did not "contain sufficient findings as to the matters on which the Commissioners based their valuation", and that the awards were "excessive, outside the range of proper testimony", and "outside the range of market value and therefore clearly erroneous". The District Court adopted and approved the reports. (R. 55, 56, 102.) Respondent subsequently on appeal specified as error the District Court's "approving . . . the reports of the Commissioners when the findings were inadequate to determine the basis on which the awards were made", and "when the reports themselves show that there were conflicts in the evidence but do not show how the Commissioners resolved them in making the awards". (R. 108), thereby abandoning the claim of excessiveness. The Court of Appeals reversed the judgments and remanded the cases for resubmission in order that the reports might meet the standards prescribed in its opinion, namely, that the Commission

find which evidence it credited and which evidence it discredited. There were conflicts in the evidence in each case as would be expected in any trial, but only in the witnesses' opinions of fair market value. Each of the Petitioners except Watson introduced sales which they contended to be comparable as independent evidence; Respondent introduced evidence of sales which it contended to be comparable only as a supporting basis for its expert's opinion of fair market value. The only conflicts in position between Petitioners and Respondent during the trials were (1) conflicts in opinion of market value, and (2) conflicts as to whether sales introduced in evidence by Petitioners were comparable.

The only questions before the Court of Appeals for the Fifth Circuit were:

(1) Whether the general objection to the Commissioner's awards, namely, that the reports did not contain sufficient findings as to the matters on which the Commissioners based their valuation was sufficiently specific to raise any question for review, particularly where no complaint was made as to the excessiveness of the awards. The opinion of the Court of Appeals did not decide this question but assumed that this general objection was sufficient.

(2) Whether the findings of fact were sufficient to sustain the judgments or whether the judgments should be vacated and the cases remanded for more specific findings.

The Court of Appeals, while noting no specific inadequacy of the findings of fact, made general observations which it concluded rendered the findings inadequate to permit an intelligent review. (R. 114, 117) and reversed the Trial Court's judgments and remanded the cases to the District Court for resubmission to the Commission in order that the reports might meet the standards prescribed in the opinion of the Court (R. 119-120).

### **SUMMARY OF ARGUMENT.**

1. Rule 52 (a) contemplates the Court finding the ultimate underlying facts which led immediately to, and were, the determinative or component elements of, the judgment rendered. The Rule does not require findings to state (a) what evidence was credited and what evidence was discredited, nor (b) the reasoning on the evidence or actual process of decision, nor (c) the qualifications of the witnesses.

2. The purpose of findings is to sift from the evidence the pertinent ultimate facts so that relevant rules of law may be properly applied, and to enable an appellate court to determine if this has been done, and if the findings of fact are clearly erroneous under Rule 52 (a).

3. The nature of the findings of fact required by Rule 52 (a) depends upon the complexity of the issues involved, and where the issues of facts are simple and the principle of law governing the case is likewise a

simple guide, detailed evidentiary findings of what evidence was credited and discredited are neither required nor necessary for intelligent appellate review of the general processes of the trial. Below:

4. The findings of the highest and best use of the land before and after the taking, the value of the land taken, the severance damage to the remainder, the value of the flowage easements, and that the fair market value of the property taken is the rule of law applicable to determining the findings of fact is a sufficient compliance with Rule 52 (a) in the instant simplest of condemnation cases.

5. (a) Rule 53 (e) (2) and Rules 46 and 61 require specific objections to findings of fact by a Master so that the Trial Court might correct any inadequacy in the first instance and thereby avoid the long delay of continued litigation.

(b) The objections in the instant cases that merely state that the findings are inadequate because they do not show the basis of the awards nor how the Master resolved conflicts in the evidence fail to comply with the required specificity to present any question for review.

(c) Had the objections been sufficiently specific, they would have presented only academic questions when no complaint of insufficiency of the evidence was made by U. S. in instant cases.

6. The decision of Fifth Circuit Court of Appeals is erroneous, should be reversed and Trial Court's judgments reinstated because:

(a) It assumed that the objections were sufficiently specific to present the question for review, or that specific objections are not required under Rule 53 (e) (2) without mentioning the subject.

(b) It erroneously decided that a general complaint of inadequacy of findings, without an attending complaint of insufficiency of evidence or other specific error of law, constituted reversible error.

(c) It erroneously interpreted Rule 52 (a) as requiring findings of fact to state what evidence was credited and discredited by the Master, that is, the very process of decision, rather than the ultimate underlying facts which are the immediately determinative component elements of the judgment.

(d) It erroneously overlooked the principles that:

(1) whether a witness was qualified to express an opinion of values, and

(2) whether evidentiary sales were truly comparable are not underlying ultimate facts, but are preliminary evidentiary questions solely for the Master to determine, absent a claim of abuse of discretion in these respects as in the instant cases, as to which express findings are not required under Rules 52 (a) and 53 (e) (2).

## ARGUMENT.

### Preface.

For sake of brevity, Petitioners are hereafter called "Landowners"; Respondent is hereafter called "U. S."; The Court of Appeals for the Fifth Circuit is hereafter called "Fifth Circuit"; and the Commission is hereafter sometimes called "Master".

That this Court is more concerned in "why" the question presented should be decided in a particular manner rather than "how" related questions have been decided in prior judicial pronouncements is indicated by the grant of certiorari in this case. The conflict in the decision sought to be reversed with the great weight of precedent in every judicial circuit of this country was demonstrated in Landowners' Petition for Certiorari (pp. 5-21). This case turns on the proper interpretation of Rules 52, 53, 71A (h), 46 and 61 of the Federal Rules of Civil Procedure. If our argument appears to be somewhat elementary, it is because the decision sought to be reversed is basically contrary to a proper interpretation and application of these rules.

### I. Requirements Of Rule 52 (a) As To Findings Of Fact.

- A. Ultimate Facts, Not Evidence Nor The Process Of Decision Nor Reasoning On The Evidence, Are Required To Be Found Under Rules 52 (a) And 53 (e) (2) Of The Federal Rules Of Civil Procedure.

Rule 52 (a) requires that in non-jury cases the "Court shall find the facts specially". As to interlocutory injunctions it requires that the Court shall "similarly set forth the findings which constitute the grounds of its action".

What are "facts" and what does the phrase "find the facts specially" truly mean? This is a key question in this case. There are other controlling questions and arguments that Landowners advance in this brief. However, this case first turns on the meaning of the one word "facts" as used in Rule 52.

It has been said that all generalizations including this one is false. This Court recognized this basic rule when it held in the case of *Kelley v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, (1) that the nature of findings of fact required under Rule 52 depends upon the particular case, (2) that delusive exactness is not required (3) that the "underlying factual basis" for the decision must be stated, and (4) that the nature of the findings required are for the Trial Court to determine in the first instance. It follows that the word "specially" as used within the rule is a relative term, depending upon the nature of the case.

At the outset, it should be remembered that the instant cases were the simplest of condemnation cases involving the valuation of farm land. "The issue was a simple one of valuation." *U.S. v. Twin City Power Company of Georgia*, (5th Cir., 1958), 253 F. 2d 195, 204. As this Court has stated:

"In an eminent domain proceeding, the vital issue—and generally the only issue—is that of just compensation." (Emphasis ours.)

*McCandless v. U. S.*, (1936) 298 U.S. 342, 347-348, 56 S. Ct. 764, 766, 80 L.Ed. 1205, 1209.

The word "fact" has many connotations. In its broadest sense, it can refer to anything for "everything in the cosmos is a fact or phenomenon". 1 Wigmore on Evidence (2nd Ed.) p. 2, §1. It is plain that this was not the meaning intended by Rule 52. Neither was it intended to refer to evidence, evidentiary facts, statements of testimony, or comments on the evidence or its effect. Evidence is the means by which a fact is proved or disproved. Wigmore, in distinguishing between evidence and fact, defines evidence as "any knowable fact or group of facts, not a legal principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, on the part of a tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked. Id. p. 3. He continues: "Each evidentiary fact may in turn become a proposition to be proved, until finally some *ultimate* evidentiary fact is reached." Id. § 2, p. 6.

If finding "the facts specially" were construed to mean that the judge must find and state the evidence or evidentiary facts with particularity, there would be no end to a trial court's duty. He would be required, in the simplest of cases, to take each witness, and each evidentiary fact to which he testified, and state whether

he believed the testimony of each witness with respect to each such evidentiary fact. Under such an interpretation of Rule 52, there would be no limit to what must be included in findings. Judge Hall in *U. S. v. Gill*, 187 F. Supp. 728 stated:

"In substance, the Government contends by Exception Number One that the commission should set forth what use it made of the testimony in arriving at its valuation, and asserts, among other things, that the commission failed to recite to what extent, if any, the commission considered the testimony of experts in assigning different values to different plots of the property and the severance damage.

"If the Government, without requesting special findings, is correct in this contention, there would be no limit to what should be included in the commissioner's report. The report would have to indicate, for instance, what weight was given to each of the many so-called comparable sales used by an expert; what the value of each fence, gate and well was; the replacement cost of a well or other water supply; the amount of water consumed by grazing adult animals, or cow and calf operation, when there is no shade and the value assigned to shade trees for grazing cattle and the amount, if any, used as replacement cost of artificial shade; the value assigned to different grasses (six of them) which naturally grow on the property; and their relative quality as feed for grazing cattle; and many other things, all of which, as well as severance damage, are purely evidentiary and collateral to the issue of just compensation and are but some of the numerous things which go into the

final expression of opinion by each expert on the total sum necessary to make just compensation."

*U. S. v. Gill*, 187 Fed. Supp. 728 at pages 732 and 733.

This case was reversed on appeal by the Ninth Circuit, but only because there was no finding as to the highest and best use of the land. See 308 F. 2d 453 at 459.

The decision of the Fifth Circuit has gone even further. It requires in addition that findings include the qualifications of each witness and to state the reasoning on the evidence, the crediting or discrediting of the evidence, and the actual process of decision. That the Fifth Circuit had previously held to the contrary was disregarded.

"We do not think it is necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record. Cf. *Seale v. United States*, 5 Cir., 1957, 243 F. 2d 145." (Emphasis ours.)

*U. S. v. Tampa Bay Garden Apartments, Inc.*, 294 F. 2d 598, 606 (5th Cir., 1961).

"A trial court may not be put in error for failure to reveal the method employed in calculating the amount of damages awarded since the method of assessing unliquidated damages in any case is not

required to be revealed by a trier of facts, either court or jury." (Emphasis ours.)

*Ginsberg v. Royal Ins. Co.*, 179 F. 2d 152 (3); 5th Cir., 1950.

"Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired."

*The Travelers Insurance Company v. Dunn*, 228 F. 2d 629, 630 (1), 5th Cir., 1956.

"Federal district court need not make findings on all facts presented nor make detailed evidentiary findings, nor make findings asserting negative of each issue of fact raised, and ultimate test as to adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for decision and are supported by evidence. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A." (Emphasis ours.)

*Weber v. McKee*, 215 F. 2d 447, 448 (4) (5) (6), 5th Cir., 1954.

"Oral findings that plaintiff, who brought suit against the government under the Federal Tort Claims Act, had a pre-existing defect in the formation of his lower back, and that such condition was aggravated at time of collision, and that he was permanently partially disabled, were sufficient to provide a basis for award of damages, and did not violate rule requiring special findings, even

though no special findings were made with regard to plaintiff's other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A."

"The findings of fact were stated orally at the trial. No exception has been taken to the form in which the findings were made. These findings, the Government contends, violate Rule 52 (a) Fed. Rules Civ. Proc. 28 U.S.C.A. in that no special findings were made with regard to Jacobs' other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. We think the findings are ample to provide a basis for the decision. *Kelley v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485, 1486; *Weber v. McKee*, 5th Cir., 1954, 215 F. 2d 447. This being so, we see no error." (Emphasis ours.)

*United States v. Jacobs*, (5th Cir., 1962) 308 F. 2d 906, 907 (2).

- B. Word "Facts" In Rule 52 (a) Is Used In Legal Sense To Denote The Ultimate Factual Conclusions Derived From Weighing The Evidence Which Are The Immediately Determinative Elements Of The Judgment.**

The decisions referred to in the notes of Advisory Committee of 1946 to Subdivision (a) of Rule 52 contemplate ultimate facts, not the evidence or the reasoning thereon. See 5 Moore's Federal Practice, 2606, § 52.01.

Pertinent quotation from many of the authorities cited in this note and the distinctions in the cases support the conclusion that Rule 52 (a) requires only the finding of ultimate facts.

In *Hurwitz v. Hurwitz*, (D. C., 1943) 136 F.2 796 no findings of fact whatever were made, but the failure to make findings was held not to be prejudicial error.

"Now, it is elementary that findings of fact should not contain a mere recital of the evidence, nor should they contain arguments or matters of explanation. The facts which the Court must find and state separately are the *ultimate issuable facts*—the facts which are put in issue by the pleadings or actually litigated as issuable facts by consent or without objection . . . .

"It is the relief granted or rights adjudicated by the conclusions of law that go in the judgment.

"We should not forget that it is unnecessary to make findings as to immaterial issues; that they should not contain *evidentiary facts* or comments of any kind. The test is: Would the findings be sufficient to authorize a judgment if presented in the form of a special verdict." (Emphasis ours.)

*Nordbye, Improvements in Statements of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 28, 32, 33.

Landowners respectfully suggest that the decision of the Fifth Circuit did "forget" these basic fundamentals.

In *U. S. v. Forness*, (2nd, 1942). 125 F.2 928 the 2nd Circuit condemned as bad practice the inclusion of proposed findings and objections in the record without the independent determination of the ultimate facts by the Trial Court.

In *Matton Oil Transfer Corp. v. The Dynamic*, the Second Circuit remanded the case for findings of fact where none were made, and only a judgment exonerating one vessel and adjudging another solely responsible was entered without any factual basis therefor, the Court saying:

"We realize that to enforce the rule in an over-scrupulous way may impose onerous labors on a district judge, beyond those actually needed for a fair presentation of an appeal. We think it appropriate to say that we are not disposed towards such an enforcement, nor have we at any time required any overelaboration of detail or particularization of facts. We agree fully with the spirit and the terms of the resolution passed by majority vote of the judges at our Judicial Conference of last June recommending 'that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion.' This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, overdetailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication:

See *Gibbs v. Buck*, 370 U.S. 66, 78, 59 S. Ct. 725, 732, 83 L.Ed. 1111; *Epstein v. Goldstein*, 2 Cir., 107 F. 2d 755, 758. The findings and conclusions of the court, however, which actually led it to the decision are helpful; and we do not think trial courts will find it unduly burdensome to state those briefly and concisely at the time decision is made. Compare *Otis, J., Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85; *Nordbye, J., Id.*, 1 F.R.D. 25, 31." (Emphasis ours.)

*Matton Oil Transfer Corp. v. The Dynamic et al.*,  
123 F. 2d 999, 1001.

The note relies heavily upon the case of *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, (2nd, 1942) 126 F. 2d 992 which contains the following incisive language:

"Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law. It is apparently impossible to expect this from counsel; and we are indeed aware that the requirement adds perceptibly to the judge's labors. Nevertheless, we are not convinced that if prepared along with the opinion, if limited in number to disputed issues, and if confined to the ultimate facts, their preparation will prove as serious a burden as is sometimes supposed; and certainly, if so prepared, they will prove of much value in the administration of justice, and will incidently greatly increase the fi-

nality of the decisions of the district court." (Emphasis ours.)

*Petterson Lighthouse & Towing Corp. v. New York Central R. Co.* (2nd Cir.; 1942) 126 F. 2d 992, 996.

In *Brown Paper Mill Co., Inc. v. Irvin*, the 8th Circuit stated:

"(1) Findings of fact should be a clear and concise statement of the ultimate facts, and not a statement, report or recapitulation of evidence from which such facts may be found or inferred." (Citing authorities.)

*Id.* 1943, 134 F. 2d 337 at 338.

In *Allen Bradley Co. v. Local Union No. 3*, the Second Circuit again reiterated the necessity for findings on the factual crux of the case in the following words:

"Doubtless this was done to satisfy requirements that an injunctive order must set forth the reasons for its issuance and describe in reasonable detail the acts to be restrained, Federal Rule 65 (d), 28 U.S.C.A. following section 723c, continuing 28 U.S.C.A. § 383, cf. 29 U.S.C.A. § 109; but a multiplicity of words is as little revealing as a dearth of words. Labor union officers and members are entitled to a more direct and succinct statement of the illegalities of which they are held guilty and which they must cease under penalties of fine and imprisonment. This basic requirement assumes the greater importance here because the course of decision below has left the case not free of ambigu-

ity on a crucial feature. For, as we shall point out, recent decisions have conceded labor unions quite broad powers to refuse to work and to employ peaceful persuasion, but have left open the effect of combinations or conspiracies of unions with non-union elements, particularly for non-union objectives. Thus the nature and purpose of the conspiracies here may quite possibly be the crux of the case."

*Id.* 1944, 145 F. 2d, 215 at 219.

In *Young v. Murphy*, (Ohio, 1946) 9 Fed. Rules Service, §2a 11, case 2, 7 F.R.D. 72, it was stated:

"Findings and conclusions should include only the ultimate facts found together with sufficient findings to support Court's opinion and judgment and not a narrative of the evidence or of the evidence and conduct of the parties in earlier proceedings or the argument or conclusions of the draftsman."

Judge Merrill E. Otis, in his able article on Improvements in Statement of Findings of Fact and Conclusions of Law concludes that each trial judge as he makes findings of fact and conclusions of law, should ask himself these questions:

"No. 3: Is each of your findings a statement of an ultimate fact?

"No. 4: Are all of the ultimate facts necessary to support the judgment or decree stated in the findings?"

*Id.* 1 F.R.D. 83 at 85.

and then comments:

"Comment: Requirements 3 and 4 have been stated hundreds of times by Appellate Courts, scores of times by the Supreme Court of the United States. In its wording the principle is simple. The difficulty in its application is in determining what are the ultimate facts in a given case. It seems to be conceded by all who have given serious thought to the matter that it is not possible to form a definition which will be a sure guide at all times. We know that an ultimate fact is to be distinguished from mere evidence. The Supreme Court has said that. Old Eq. Rule 25, 28 U.S.C.A. following § 723, which concerns the framing of a complaint in equity, makes that distinction. The distinction is presented in the very word 'ultimate' in the phrase 'ultimate fact'. Perhaps we may say as to any fact, whether it has been directly proved in evidence or is an inference from facts proved, if it serves the sole function of supporting (not some other inference of fact) but the final legal conclusion that either Plaintiff or Defendant shall prevail, perhaps we may say as to such a fact, it is an 'ultimate fact.' It occurs to me that there are two tests with which every federal judge is familiar which the judge may use to determine whether facts he is considering for his findings are ultimate facts. The tests are these—1. If he were drawing a complaint for the Plaintiff in the case before him, what allegations of fact would he want to support the prayer of his complaint? 2. If the case were a jury case, what facts would he in his charge require the jury to find as a basis for a verdict for the Plaintiff? These are

the 'ultimate facts' required to support a judgment for the Plaintiff. I consider that often a finding of one ultimate fact (or two or three ultimate facts at the most) may be sufficient to support a judgment for the Defendant."

*Id.* pp. 85-86.

"Is there not an analogy here between findings of fact and conclusion of law. Only ultimate facts are to be stated not every evidential fact that merely leads to some ultimate fact. Why should there be stated in the formal conclusions every intermediate conclusion of law, which serves no other purpose than to lead to the final conclusion. Every case is filled with the judge's statements of conclusions of law on preliminary motions, or points of evidence on all kinds of questions presented in the trial at one time or another. Every one of these conclusions, in a sense is intermediate, not the final, the ultimate, the determining conclusion of law."

"No one indeed ever has had the thought that every conclusion of law reached in a case should be stated in the formal conclusions. It has, however, been my thought heretofore that the more important conclusions those nearest in logical order to the final conclusion should be stated."

*Id.* pp. 86-87.

An enlightening comment on the intent and application of Rule 52 (a) by George F. Longsdorf, Librarian for the Ninth Circuit Court of Appeals, is found in a footnote to the article by Judge Yankwich entitled, "Findings in the Light of Recent Amendments to the

Federal Rules of Civil Procedure", 8 F.R.D. 271, which quotation reads as follows:

"Rule 52 (a) of the Federal Rules of Civil Procedure requires the judge (the Rules uses the word 'court') to 'find the facts specially'. Here, as elsewhere, 'specially' is a relative word, which, I take it, means that the judge shall make a finding on each specific fact which is ultimate or essential to a conclusion which supports his judgment. If I am right, then in one case a finding of a particular fact might be sufficiently specific, while in another case exactly the same language of finding might be too general.

"I am inclined to reject the notion that the findings are to be a history of what went on in the judge's mind, taken in by his ears and eyes against his undescribable background knowledge; and to believe that the findings are to be only those supportable deductions from evidence in the transcript which will yield the conclusions reached and the judgment given. If we go into the psychology of it too far we shall have a result too much like fertile eggs over treated with heat and stirring, to wit, scrambled eggs instead of chicks." (Emphasis ours.)

*Id.* 8 F.R.D. 271, 285-286.

This statement is in accord with this Court's ruling in the *Kelley* case, 319 U.S. 415, to the effect that the nature of the findings required depend upon the subject matter of the case and the nature of the thing decided.

**C. Prior Decisions Of This Court Relating To Findings By A Trial Judge In a Non-Jury Case Are In Accord With The "Ultimate Fact" View Of The Rule.**

"The special finding is a statement of the ultimate facts on which the law of the case must determine the rights of the parties, and not the evidence on which these ultimate facts are supposed to rest."

*Norris v. Jackson*, 9 Wall 125, 19 L.Ed. 608 (1870).

"A special finding of facts by the Court need only find the ultimate facts, not the evidence."

*Union Consolidated Silver Mining Co. v. Taylor*, (3) (1879) 100 U.S. 37, 25 L.Ed. 541.

To same effect:

*Merchants' Mut. Ins. Co. v. Allen*, (1887) 121 U.S. 67 (4), 7 S. Ct. 821.

*Merchant's Mut. Ins. Co. v. Allen*, (1887) 121 U.S. 67, 7 S. Ct. 821 at 824.

*Grayson v. Lynch*, (1896) 162 U.S. 468, 16 S. Ct. 1066.

*Wilson v. Merchants' Loan & Trust Co.*, (1901) 183 U.S. 121, 22 S. Ct. 55, at pp. 58, 59.

See also: 53 Am. Jur. 795, § 1142.

"A discussion of portions of the evidence and the District Court's reasoning in its opinion do not constitute the special and formal findings by which it is court's duty appropriately and specifically to determine all issues presented, and are not a compliance with equity rule requiring fact findings

and conclusions of law to be stated. Equity Rule 70-1/2, 28 U.S.C.A. following section 723." (Emphasis ours.)

*Interstate Circuit Inc. v. United States*, (1938)  
304 U. S. 55, 58 S. Ct. 768 (3).

"And where, as here, different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

*Kelley v. Everglades Drainage Dist.*, (1943) 319  
U.S. 415, 420, 63 S. Ct. 1141, 1144.

"We agree. Fed. Rules Civ. Proc., Rule 52 (a), 28 U.S.C.A., in terms, contemplates a system of findings which are 'of fact' and which are 'concise'. The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. *Kelley v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485, and cases cited."

*Dalehite v. United States*, (1953) 346 U.S. 15, 24,  
73 S. Ct. 956, 962, note 8.

The complexity of the issues in the *Kelley* and *Dalehite* cases are in contrast with the simplicity of the issue in the instant cases.

A comparatively recent pronouncement on the subject of findings under Rule 52 (a) is the opinion in the case of *Stanton v. United States*, (1960) 363 U.S. 278, 292, 80A S. Ct. 1190, 1200, where this Court stated:

"To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a 'gift'. To be sure, conciseness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See *Matton Oil Transfer Corp. v. The Dynamic*, 2 Cir., 123 F. 2d 999, 1000-1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately \* \* \* conclusions of law thereon.' While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive."

*Stanton v. United States*, (1960) 363 U.S. 278, 292, 80A S. Ct. 1190, 1200.

The *Stanton* case is readily distinguishable. This Court in that case held that an unelaborated finding of a legal conclusion of a "gift" did not constitute an adequate finding of the element of "intent" as an underlying fact of the gift. Failure to find a fact as to the only contested element of the ultimate issue is inadequate; but this hardly means that a Court must state what evidence he believed or disbelieved.

**D. Findings Of Fact And Conclusions Of Law Of Master's Reports Are Adequate For Purposes Of Proper Review In Instant Cases.**

The number and nature of findings required by Rules 52 and 53 depend upon:

- (1) the nature of the contested issues involved in the case,
- (2) the specific objections to the Master's findings, and
- (3) the issues raised on appeal.

Before discussing these questions, the proper scope of appellate review by an intermediate Appellate Court as contemplated by the Rules should be kept in the forefront.

Findings are not jurisdictional nor are they the ultimate goal of the judicial process. Indeed, one of their prime purposes is to give the Appellate Court an understanding of the basis of the judgment so that it may determine if the judgment is clearly erroneous. In this connection, it is not the province of a Court of

Appeals to retry the case, even if it could: It is not generally concerned with the economic adequacy or inadequacy of the judgment. When the issues are properly presented on appeal, it will not generally reverse a judgment unless it is convinced (1) that a mistake has been made, or (2) that the Trial Court has labored under a clear misapprehension of the law which infected the judgment, or (3) that the judgment is without competent evidence to support it. The Appellate Court must give due regard for the pre-eminence of the factfinder to judge the credibility of the witnesses. This takes on added significance when the factfinder has viewed the land, and is in a position to weigh opinion testimony and judge the comparability of contended comparable sales as no one else is. Indeed, the burden of overthrowing an award of value becomes increasingly heavy since value, like intent, is peculiarly a fact question. The burden is all the more onerous when it is recognized that fair market value is little more than an informed guess and, further, there are no automatic or mathematical formulae for the determination of fair market value which an Appellate Court might apply to an award, even though it would have rendered a different decision had it been the factfinder. Only the factfinder has the inherent right to disregard the opinion testimony of any witness.

There is no contention by U. S. that any error of law infected the judgment, nor that the legal standard of fair market value was not understood and applied, nor that the awards are not within the range of competent

evidence to support them. The only contention raised was that the findings did not spell out how the Commissioners arrived at their award, nor expressly state how they resolved the conflicts in the evidence. While the U. S. could have raised the question of the sufficiency of the evidence, it did not do so.

No court decision of which we are aware had previously held that a Court must state the process by which it arrived at the amount of the damages assessed in the judgment. There are cases which hold to the contrary.

The U. S., in its Petition for Certiorari in Case No. 790, *U.S. v. Merz*, phrases the question presented as follows:

"Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined."

The phrase "tried outside the presence of the Court" is not entirely accurate. A Master is an arm of the Court expressly provided for by Rule 53 and 71A (h). The clause "which does not show what facts were considered or what law was applied" is not applicable to instant case, and erroneously presumes that a report must state all purely evidentiary facts and evidence considered.

In the instant cases, the reports as well as the instructions to the Master show that the concept of fair market value governed the Master. The Master expressly so found. (R. 21, 40, 48, 98.) Insofar as "what facts were considered", the reports found "from the evidence as a whole" which was summarized all essential facts, namely: (1) highest and best use of the land before and after the taking (2) severance damages and the basis therefor, and (3) the value of the flowage easements. In the *Lindsey* case (R. 38) the report made an express finding as to no severance damage to his homeplace. In the *Watson* case (R. 43) the Commission expressly found that evidence of use of the property for residential or subdivision purposes was rejected.

Other than the facts found, there was nothing else for the Commission to consider save opinion evidence and the comparable sales introduced by Landowners, weighed in the light of their visit to the land. The word "facts" as used in the question as phrased necessarily presumes that evidentiary facts as distinguished from ultimate facts are required to be found as considered. Landowners respectfully submit this is not required.

Professor Wigmore again furnishes an analogous illustration. See 1 Wigmore on Evidence (2nd Ed.) p. 2, § 1. Assume a case where the ultimate issue is the question of ownership of a tract of land by John Doe. This breaks down into the underlying ultimate evidentiary facts that John Doe's father died without a will leaving John Doe as his sole heir. Merely finding

that John Doe was the owner of the tract of land might be deemed by some Courts an insufficient compliance with the rule. For example, this Court concluded in the *Stanton* case, 363 U.S. 278, 292, that the unelaborated finding of a "gift" was insufficient.

Applying this example to the instant cases, however, the ultimate issue was just compensation. On analysis, this issue resolved itself into three component elements, or ultimate underlying facts, namely: (1) the fair market value of the land taken (2) the severance damage to the land not taken, and (3) the value of the flowage easements. All of the evidence, whether opinion evidence or allegedly comparable sales were introduced to persuade the Commission, as to these underlying ultimate facts of the ultimate issue of just compensation. The failure to grasp the distinction between purely "evidentiary facts or evidence" and the "ultimate underlying facts or the underlying factual basis" for the judgment lies at the root of the error of the Court of Appeals for the Fifth Circuit.

Next, "effective court review" does not contemplate retrial of the factual issues but only to determine if the facts found are clearly erroneous.

Next, effective court review must be for some specific purpose on questions properly raised in the appeal itself. The U. S. not only failed to file specific objections to the findings of the Commission, but likewise failed to raise any question on review by the Court of Appeals as to excessiveness or insufficiency

of the evidence. More specific findings for what? Findings are not the goal of the judicial process, as has been repeatedly recognized. The object of findings is to prevent star-chamber methods; not to overburden trial judges with an overscrupulous enforcement of Rule 52 (a).

Fairly construing the reports under the presumption of correctness, and drawing the only inference that can be drawn from the end result, it is obvious from the summary of the evidence considered and the end result that the Commission rejected the opinion evidence of the witnesses for the U. S. and did not as such accept the opinions of Landowners' witnesses nor find Landowners' comparable sales to be identical, but arrived at their own independent findings, weighing the evidence in the light of their visits to the lands taken. That the ultimate awards exceeded the amounts initially deposited into Court by the U. S. as required by law is wholly unrelated to the trial of the case on appeal or otherwise. Due process required these deposits before the taking of the land. The deposits have no other relevancy. In fact, the amount deposited is not admissible in evidence, and the fact that the awards exceeded the amounts deposited does not make for, nor illustrate the Fifth Circuit's conclusion (R. 113) that the failure to contend excessiveness did not render the failure to make detailed findings harmless. This was wholly foreign to any issue on appeal, and the reference to it by the Court of Appeals points to the unsound basis of the decision sought to be reversed.

## II. No Questions Were Properly Presented For Review By Court Of Appeals.

### A. Specific Objections To Master's Report Are Necessary To Present Question For Review, Where No Claim Of Insufficiency Of Evidence Nor Excessiveness Is Made.

Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides:

"... within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Emphasis ours.)

This Court held in *Kelley v. Everglades Drainage District*, 319 U. S. 415, at 422, 63 S. Ct. 1141, at 1145:

"Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

*Id.* p. 422.

It further stated that "Delusive Exactness of findings is likewise not demanded". *Id.* p. 419.

Rule 53 (e) (2) clearly requires specific objections to the Master's report. 5 *Moore's Federal Practice* 2970-71, § 53.11, notes 20-23 inclusive, and cases cited.

"There was and still is a proper use of exceptions or objections to make and save a question for review in the sense that upon the incoming of a master's report objection to it must have been taken, otherwise the report will be confirmed as made. Whatever it be called, this is not an exception to the court's ruling, but rather is but a mode of objecting below, in order to make an assignable ruling. The action of the court is subject to review on appeal from the decree, and is reviewed on the record thus made. Proper practice requires that objections to a master's report be taken in the trial court, so that any errors discovered therein may be rectified by the court itself, or by a reference to the master for correction." (Emphasis ours.)

*Cyclopedia of Federal Procedure*, (3rd Ed.) Vol. 13, §59.39, pp. 372, 373.

No such specific objections to the Master's report were made by U. S. In substance, the only objections made by U. S. on appeal (R. 108) was (1) that the trial court erred in not ordering the Master to make complete findings of fact; (2) the findings of the Master's reports were inadequate to determine the basis on which the awards were made; and (3) that the reports

do not show how the Master resolved conflicts in the evidence.

These are no objections whatsoever. They point to nothing. They do not tell the Trial Court in what respects the reports are inadequate. Objections serve a useful and meritorious purpose, namely, (1) to relieve the Trial Court from having to retry the entire case, and (2) to give the Trial Court an opportunity to have specific inadequacies remedied, prior to appeals to appellate courts, and thereby avoid the interminable delay of continued litigation. Rule 52 (a) provides that "Requests for findings are not necessary for purposes of review" and 52 (b) provides that "When findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings . . .". This rule applies to findings by the District Court, not to a Master's findings as to which Rule 53 is controlling. Any authorities to the contrary (See *Henry Hanger & Display Fixture Corporation of America v. Sel-O-Rak Corporation*, (5th Cir., 1959) 270 F. 2d 635 (11), failure of decree to allow claimed credits as to which the evidence to support same was lacking) ignore the basic purpose of requiring objections to a Master's report. The following better reasoned authorities require specific objections to a Master's report so that the Trial Court may correct or have corrected the reports in the first instance.

"Exceptions to a Master's report should point out specifically the errors relied upon; and they need not be considered if they are so broad as to amount merely to a denial of the facts and conclusions of the master, so as to require the court to rehear the entire case." (Emphasis ours.)

*Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon et al.*, 151 U.S. 285 (3), 14 S.Ct. 343.

To same effect:

(a) *U. S. v. Northern Pacific Railway Company*, (1940) 311 U.S. 317 at 371-372, 61 S. Ct. 264, 288-289.

(b) *Coghlan v. South Carolina Railroad Co.*, 142 U.S. 101, 12 S. Ct. 150 at 154.

(c) *Thomson Machine Co. v. Sternberg*, (District Court, Illinois, 1931) 55 F. 2d 715.

(d) *Virginia-Carolina Tie & Wood Co., Inc. v. Dunbar*, (4th, 1939) 106 F. 2d 383 (6), at 386 and cases cited.

(e) *Massachusetts Bonding and Insurance Co. v. Preferred Automobile Insurance Co.*, (6th, 1940) 110 F. 2d 764 (1) (2).

(f) *Bucy v. Nevada Construction Co.*, (9th, 1942) 125 F. 2d 213 (8).

(g) *Kimm v. Cox*, (8th, 1942) 130 F. 2d 721 (14) (16).

(h) *Socony Vacuum Oil Co., Inc. v. Oil City Refiners, Inc.*, (6th, 1943) 136 F. 2d 470 (17), at 475.

(i) *U. S. v. Vater*, (2nd, 1958) 259 F. 2d 667, 668 (4) (8).

The most recent treatment of this subject as applied to the identical contentions made by United States in the instant cases which was adopted by the Fifth Circuit in the opinion to be reviewed, was expressly rejected by the Ninth Circuit Court of Appeals in the case of *United States v. Lewis et al.*, (9th, 1962) 308 F. 2d 453 wherein the Court stated:

"(2) The United States appears to urge upon us a sort of supervisory function in this respect and that we deal with the matter in the abstract. It invites us to look at the commission's reports in these cases; to observe that each upon its face fails to measure up to standard; to send the cases back with general instructions that adequate reports be made.

"This course we reject. If there be inadequacies in a particular report, they must be specified by objection to the report. If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations.

"We shall then in each case examine the record and briefs to ascertain what specific matters are asserted, by objections of the United States, not

to have been dealt with adequately." (Emphasis ours.)

*Id.*, p. 456.

While Rule 52 (a) provides that "the findings of a Master, to the extent that the Court adopts them, shall be considered as the findings of the Court", the appellant without filing specific objections to the Master's report as contemplated by Rule 53 (e) (2) is restricted on appeal to the question of the sufficiency of the evidence to support the findings as is provided in Rule 52 (b). Such is the plain intent of the Rules.

Landowners do not contend that it is necessary that specific objections be made to the Master's report in order to raise the question of the sufficiency of the evidence on appeal. Landowners do contend, however, that it is necessary in order to raise any other question on appeal to a Circuit Court of Appeals, to file specific objections to a Master's report so that the Trial Court may be given an opportunity to consider the question raised, and carry out its express duties under the last sentence of Rule 53 (e) (2). Rule 46, while it dispenses with formal exceptions, still must be construed with Rule 52 (e) (2) and the requirement of making known to the Trial Court the action which one desires it to take or his objection to the action of the Court and his grounds therefor still has substantive application.

The fact is that no contention is made by United States in the instant cases that the evidence is insuf-

efficient to support the awards, nor that the awards are excessive. (R. 108-109.) The points upon which U. S. relied on appeal do not mention this contention. U. S. did so contend in its original objections to the Master's Reports, (R. 50, 52, 100) but abandoned same when it limited its points on which it intended to rely on appeal. Having so limited its contentions by its designation of points, it is so bound, and no other questions were properly before the Fifth Circuit. See Rule 75 (d) of the Federal Rules of Civil Procedure. The Fifth Circuit (Rule 10) has adopted Rules 46 and 75 of the Federal Rules of Civil Procedure. There is no error in failing to consider a point not specified in the designation of points. *Jesionowski v. Boston & M. R. R.*, 329 U.S. 452 (5), 67 S. Ct. 401. If U. S. is so restricted, then why consider the abstract or moot question of whether the findings are adequate? The questions raised by the designation of points are indeed abstract or moot questions. It is not the function of Appellate Courts to render advisory opinions to the U. S. or anyone else.

In addition, the decision of the Court of Appeals runs counter to the harmless error rule embodied in the Act of May 24, 1949, C. 139, § 110, 63 Stat. 105, 28 U.S.C.A., § 2111, which provides:

"On the hearing of any appeal of writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This is in substance the same rule as Rule 61 of the Federal Rules of Civil Procedure applied to Appellate Courts.

"Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."

*Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 482.

"Where master's findings and Court's judgment result in substantial justice as between parties, judgment should be affirmed under former section 391 of this title."

*I.T.S. Rubber Co. v. Tee Pee Rubber Co.*,  
(C.C.A. Ohio, 1924) 295 F. 479.

"Error is not ground for reversal unless it is prejudicial to substantial rights of appellant."

*Commercial Credit Corporation v. United States*,  
(C.A. Minn., 1949) 175 F. 2d 905.

"Fact matters which have been determined by a master and approved by Trial Court should not be overturned except on clearest showing of mistake."

*Seeley v. Hunt*, (5th Cir., 1940) 109 F. 2d 595.

"Where any modification in subsidiary findings would not be basic or essential ones, no reversible error is shown."

*U. S. v. Crescent Amusement Co.*, 323 U.S. 173,  
65 S. Ct. 254, 89 L.Ed. 160.

### III. Decision Of 5th Circuit Court Of Appeals Is Clearly Erroneous.

Landowners acknowledge the burden of demonstrating that the decision sought to be set aside is erroneous, see *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (3), 63 S. Ct. 337, 87 L. Ed. 468, and assert that it is clearly wrong and should be reversed; and the Trial Court's judgment reinstated, for the following reasons:

(1) It misconstrued and misapplied the requirement of the Court finding the ultimate facts specially under Rule 52 (a) to the simplest of condemnation cases.

(2) It relaxed the requirement of specific objections to a Master's Report as contemplated by Rules 53 (e) (2) and Rule 46, where no claim of excessiveness was made, and thereby erroneously considered a question not raised in the Trial Court.

(3) It required detailed evidentiary findings and the Master to state what evidence it credited and discredited, in fact, the process by which the ultimate awards were reached, contrary to prior holdings, so that it might determine if the awards were clearly erroneous, as though there existed an automatic formu-

la by which it could redetermine market value, when no claim of insufficiency of the evidence was made.

(4) It violated the essence of Rule 61 of the Federal Rules of Civil Procedure in assuming that a reviewable question was presented, and that detailed evidentiary findings were necessary although no claim of excessiveness was made. In other words, it holds that one can show reversible error without showing both error and injury, contrary to the requirement that no judgment be reversed for errors which do not affect the substantial rights of the parties.

(5) It relied upon decisions altogether not in point, and which, if reasonably construed, support Landowners' position.

(6) It ignored all presumptions in favor of the Trial Court's findings.

(7) The decision, if correct, utterly destroys the utility of a Master under Rule 53.

(8) The decision, if correct, throws an intolerable burden on the already heavily burdened trial judges of the Federal District Courts.

(9) It misconceives the scope of proper appellate review of findings of fact.

(10) Contrary to repeated authority, it seeks to retry the case on an appellate level.

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(11) The error of the decision stems from an erroneous assumption that the propriety of reference to a commission instead of a jury trial was a question on appeal.

(12) It ignored the province of the Master to determine qualifications of witnesses, the weight of opinion evidence of value, and comparability of evidentiary sales, in absence of abuse of discretion as to which no contention was made by U. S.

**A. Question Of Reference To Commission Not Involved.**

The opinion of the Fifth Circuit commences by citing the following cases in support of its decision.

1. *U. S. v. Buhler*, 5 Cir., 254 F. 2d 876.
2. *U. S. v. Leavell & Ponder, Inc.*, 5th Cir., 286 F. 2d 398, 407, 408.
3. *U. S. v. Buhler*, 5th Cir., 305 F. 2d 319, 331.

These cases are cited in support of its position that the trial of condemnation cases is typically for the jury and the appointment of commissioners is proper only in the exception case. (R. 114.) This is basic since it is incorporated in Rule 71A (h) of the Federal Rules of Civil Procedure. In fact, the entire error of the Court's decision stems from the assumption that this was an issue in the instant cases, when it was not remotely involved. The facts are that both

Landowners and U. S. demanded a jury trial initially. The Trial Court referred the cases to a Commission, and neither of the parties excepted nor made this a basis of appeal, claiming an abuse of discretion in this respect.

Next, the opinion seeks to justify its requirement of the Commission "baring its soul" in its report by pointing out the claimed advantages of a jury trial over a Commission. (R. 114-115.) This utterly ignores the precautions taken by the Trial Court. He gave the Commission detailed instructions (R. 21). The Chairman of the Commission was an experienced attorney, skilled in all respects of the judicial process. (R. 23.) Presumably he knew the elementary law applicable to the simplest of condemnation cases, and that truly comparable sales, if found to be such, are the highest and best evidence of market value. The conclusions of law so acknowledge (R. 48). The decision in *Baetjer v. U. S.*, (1st Cir., 1944) 143 F. 2d 391, 397, states that truly comparable sales are the best evidence of market value. This is basic. It also holds that whether sales are truly comparable, and entitled to weight is for the factfinder to determine. The decision in *International Paper Co. v. U. S.*, (5th Cir., 1955) 227 F. 2d 201, 208, merely follows this well-recognized law. A good statement of the rule is likewise found in *U. S. v. Burlington & Ocean Counties* which held:

"In condemnation proceeding, recent sales of particular premises or of similar parcels are the

most desirable standard in determining value of property, but, in absence of such sales, valuation still can be arrived at by opinion evidence."

*U. S. v. 13,255.53 Acres of Land in Burlington & Ocean Counties, N. J.*, 158 F. 2d 874 (4) (3rd Cir., 1946).

To same effect: *Baetjer v. U. S.*, (1st Cir., 1944) 143 F. 2d 391 (16).

See also: *Welch v. Tennessee Valley Authority*, (6th Cir., 1939) 108 F. 2d 95 (22).

#### **B. Qualifications Of Landowners' Witnesses Not Involved.**

The opinion makes an indirect reference to the "defects and weaknesses of the testimony of the interested parties to the proceeding, such as the owners of the land involved." (R. 114), and the qualifications of the Landowners' witnesses. (R. 114.) No reference was made to the lack of findings of the so-called experts for the U. S. This completely overlooks the generally accepted principles of law that the owner of a tract of land is presumably qualified to give an opinion as to its value, without first proving his qualifications.

The question of the Landowners' qualifications was not remotely involved in the instant cases. No objection to the witnesses' testimony for lack of qualifications to testify was made by U. S. Had objection been made,

they would not have been meritorious under well established principles.

See 1 Wigmore on Evidence, (2nd Ed.), § 711-714, pp. 1129-1131 where it is stated that the matter of a witness's qualifications to testify as to value involves three distinct questions, namely:

"(1) the experiential capacity of witness.

"(2) his knowledge of the standard of value.

"(3) his knowledge of object to be valued."

*Id.* § 711, p. 1129.

This author then states:

"The general tendency of the Courts, however, is towards a broad principle that no special training or occupation is necessary to enable one to estimate values. The practical effect may be said that Courts will prefer to require no special training except where it seems to be clearly essential."

*Id.* § 712, p. 1130.

"Land Value--

"(1) Must the witness be by occupation a dealer in land? The Courts unanimously answer this in the negative.

"(2) Must the witness himself have made a purchase or a sale of land or a number of them? This is generally answered in the negative. Yet certainly such a personal participation in sales would be a sufficient qualification.

"(3) Must the witness at least have had knowledge, not merely of general value—rumor or the like but of specific sales made? This too is generally regarded as not essential. But certainly such knowledge of specific sales in the neighborhood is a sufficient qualification.

"(4) Occasionally all specific limitations or tests are abandoned and the broad test adopted that 'any person having knowledge of' or 'acquainted with' the values may testify. The determination of the qualification thus being left open for each case. This is perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge.

"(5) A sufficient qualification is usually declared to exist where the witness is a resident, landowner or farmer, in the neighborhood."

*Id.* § 714, pp. 1130, 1131.

To same effect: Orgel on Valuation Under Law of Eminent Domain, Vol. 1, § 132, pp. 567-568.

Whether a particular witness is qualified to render an opinion as to value is a preliminary question of fact for the Chairman of the Commission to deter-

mine, (R. 25), as to which he is allowed a wide discretion. Orgel on Valuation under the Law of Eminent Domain, Vol. 1, § 132, pp. 564 et seq. and cases cited. The decision erroneously infers (R. 114) that the witnesses were not qualified, although no point was raised by the U. S. in this regard.

This Court and numerous other Courts have affirmed the generally accepted rule that an owner is presumed to have sufficient knowledge to testify as to the value of his land. Lack of experience goes not to competency of the witness but to credibility.

"3. In an action for compensation for the right of way of a railroad, taken through a mining claim, or 'prospect', witnesses resident in the neighborhood, and familiar with the property, are competent to testify as to its value, though their opinions may not be based on sales of the same or similar property."

*Montana Ry. Co. v. Warren et al.*, (1890) 11 S. Ct. 96 (3), 137 U.S. 348.

"After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination."

*Id.* 11 S. Ct. 98.

To same effect:

*Nicholson v. U. S.*, (8th Cir., 1944) 141 F. 2d 981 (10);

*Ruud v. U. S.*, (9th Cir., 1958) 256 F. 2d 460 (1). (2) (3);

*U. S. v. Alker*, (3rd Cir., 1958) 260 F. 2d 135, 156.

At any rate, this question was not before the Fifth Circuit, and it properly had no place in a decision of the case. Had it been involved it would have been without merit because adequate qualifications were proved as to each witness, as an examination of the transcript would disclose.

Finally, Rule 52 (a) had not been construed heretofore to require findings to state the qualifications of each witness.

**C. Decision Relies Upon Decisions Not In Point, And Overlooks Clear Thread Of Distinction In the Cases.**

The opinion of the Fifth Circuit states that it is in accord in the quotation from *U. S. v. Cunningham*, (4th Cir., 246 F. 2d 330, 333) (R. 115). The reliance upon this language, as well as its reliance upon *U. S. v. Lewis*, 308 F. 2d 453, seems wholly misplaced, because neither support the decision to be reviewed. In the first part of its opinion, it is conceded that these cases involved "ordinary farm, timber and pasture land" (R. 113), in other words, the simplest of

condemnation cases. It is more than significant that the Fifth Circuit's opinion omits any reference to the noted distinction No. 1 which the Fourth Circuit made in the very language quoted by the Fifth Circuit, namely:

"1. The case is very different from *United States v. Pendergrast*, 4 Cir., 241 F. 2d 687, where the issues were simple and we held that the decision below could be reviewed as well without findings as with them." (Emphasis ours.)

*United States v. Cunningham*, (4th Cir., 1957) 246 F. 2d 330, 333, Note 1.

This distinction was repeatedly urged upon the Fifth Circuit to no avail. The failure to make findings as to the highest and best use or some other vital issue in the case that materially affected the ultimate finding of just compensation is present in all reversals of awards by Commissions of which we are aware. We refer the Court to the clear thread of distinction exhibited in the following cases.

1. *U. S. v. Cunningham*, (4th Cir., 1957) 246 F. 2d 330, 333 (4-6) where no findings as to highest and best use was made, and compare *Cunningham v. U. S.*, (4th Cir., 1959) 270 F. 2d 545, 550, after findings as to highest and best uses were made.

2. *U. S. v. Bell County*, (5th Cir., 1958) 259 F. 2d 23; no findings as to highest and best use, and no findings of consequential benefits.

3. *U. S. v. Buhler*, (5th Cir., 1958) 254 F. 2d 876, 877; no findings of highest and best use.

4. *U. S. v Tampa Bay Garden Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598 (3) (8) (9), where the Fifth Circuit refused to require specific findings as to each evidentiary conflict in the record.

5. *U. S. v. Merz*, (10th Cir., 1962) 306 F. 2d 39 (3) (4) at 42, 43, which specifically rejected the contentions of U. S. in instant cases.

6. *U. S. v. Carroll*, (4th Cir., 1962) 304 F. 2d 300 at 305, failure of Commission to find highest and best use, whether a farm for marketable sod, or for residential purposes, entirely in accord with and following *U. S. v. Cunningham*, 246 F. 2d 330.

7. *U. S. v. Lewis, Benning & Morrison*, (9th Cir., 1962) 308 F. 2d 453, which (a) rejected the contention that general objections to a Master's Report present any question for review, (*Id.* at p. 456). (b) points out the very distinction above set forth, citing *U. S. v. Carroll*, (4th Cir., 1962) 304 F. 2d 300 (*Id.* at p. 458). (c) emphasizes the distinction in the *Benning* and *Morrison* cases where highest and best use was expressly found (*Id.*, see particularly headnote 7 at p. 460 where the Ninth Circuit expressly rejected the identical contentions of U. S. that a Commission must expressly show in its report what proof it relied on and why it chose to believe certain evidence rather than other evidence).

8. *Gill v. U. S.*, (9th Cir., 1962) 313 F. 2d 416, where the Ninth Circuit reversed the Trial Court's reduction of the Commissioners' award where the Trial Court had not viewed the land, and the Commissioners had done so, and where the Commission's report did *not find the highest and best use*, and where specific objections to the Commission's lack of findings as to (a) highest and best use (b) differing values as to differing portions of the land condemned, (c) comparable sales (d) severance damage, and (e) no finding with reference to available irrigation water, which modification by Trial Court, lack of findings and specific objections, are to be contrasted with instant cases. However, to the extent that the *Gill* case holds that specific objections can require detailed evidentiary findings as to comparable sales or what evidence the Commission credited and discredited or the process by which the awards were reached, it is contrary to prior decisions, and the spirit and intent of Rules 52 and 53 of the Federal Rules of Civil Procedure and is unsound in this respect, and is a departure from the *Benning* and *Morrison* cases, (9th Cir., 1962) 308 F. 2d 453, at 460.

#### **D. Finding As To Each Evidentiary Conflict Not Required.**

The decision of the Fifth Circuit in the instant case quotes *italics* from *U. S. v. Bell County*, 295 F. 2d 23, at 29, as follows:

"As examples of the deficiencies in the findings it may be noted that (1) *nothing is found as to*

how commissioners resolved the conflicts in the testimony, (2) no findings as to the uses of the land particularly Tract 805 and no determination as to benefits." (R. 116.)

The second and third deficiencies referred to in the above quotation were not involved in the instant cases because as to the second deficiency, namely, uses, there was an express finding, and the third deficiency, namely, benefits, was not involved. As to conflicts in the testimony, no other case of which we are aware has reversed a judgment for failing to make express findings on conflicts in opinion evidence as to value. Indeed, the prior Fifth Circuit decision in *U. S. v. Tampa Bay Garden Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598, 606, held to the contrary when it said:

"The Government complains that the Commission and the Court failed to make explicit findings with respect to a number of questions which it asserts are decisive. The Commission found that there was a dispute as to termite damage and that such damage was inconsequential at the time of taking. The finding is challenged and the Government contends that the Commission committed error in failing to include in its appraisal computation an amount for termite control. The Government asserts that there must be a reversal because the Commission concluded that leasehold furniture should be regarded as a short-lived facility, beneficial to the utilization of the leasehold, and consideration should be given to its effect on the gross income from the leasehold and

to the financial burden of necessary replacements. In the consideration of these and other contentions of the Government, we must not forget that the ultimate determination is to be of an amount to be awarded as just compensation to the owner of property taken by the sovereign. The measure of the award is in many, perhaps most, instances based upon opinions. The amounts to which the expert appraisers testify, the amount fixed by jurors or commissioners, and the amount determined by the court are all opinions and, as has been said, an informed guess. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336. The judicial determination of the award in a condemnation case cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula. *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 1392. We do not think it necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record. Cf. *Seale v. United States*, 5 Cir., 1957, 243 F. 2d 145. We do not believe that the court omitted findings on any essential factual issues so as to prevent this Court from determining whether the result was based upon clearly erroneous findings." (Emphasis ours.)

*United States v. Tampa Bay Garden Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598, 606.

While the *Tampa Bay Gardens* case was by another division of judges of the Fifth Circuit Court of Appeals,

it is noteworthy that the decision sought to be reversed studiously avoids any reference thereto although Landowners expressly contended it to be controlling in this respect. It is also worthy of note that the Tenth Circuit in *Merz*, 306 F. 2d 39 (3) at pp. 42-43 cites the *Tampa Bay Garden* case, and the Fourth Circuit case of *U. S. v. Pendergrast*, 241 F. 2d 687, referred to in the footnote No. 1 to *U. S. v. Cunningham*, 246 F. 2d 330, at 333, to which the opinion to be reviewed likewise omits any reference. The decision to be reviewed does not withstand the force of the distinction since it fails to come to grips with it.

**E. Reliance By Fifth Circuit On *U. S. v. Lewis* (9th Cir., 1962) 308 F. 2d 453, Is Without Basis.**

Next, the decision of the Fifth Circuit quotes (R. 116-117) from and relies upon *U.S. v. Lewis, supra*, as supporting its reversal in the instant cases. Such reliance is the product of failing to construe the quoted language in context.

The quoted language was in response to the Trial Court's decision that no findings whatever are required under Rules 52 and 53 by a Commission in condemnation cases, and holding this to be error. It was not a holding that detailed evidentiary findings as to all phases of the evidence is required by Rule 52 (a). Indeed, the language of the Ninth Circuit's decision speaks for itself, which follows:

"There must at least be resolution of factual disputes as to the character of the property, its

highest and best use and the elements which contribute to its value; and disputes as to applicable principles of valuation."

*Id.* at 456.

Landowners have no argument with this language. As applied to the instant cases, there were no factual disputes as to the character of the property, nor of its highest and best use, nor of the elements which contributed to its valuation, nor as to applicable principles of valuation. Indeed the only conflicts in the evidence were conflicts in opinion evidence of value. Landowners agree that "there must be a sufficient disclosure to the reviewing Court to enable it to understand what it is that has been decided," *U. S. v. Lewis*, 308 F. 2d 453, 456, "but this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result". *Id.* at p. 460. Nothing in the *Lewis* case supports the Fifth Circuit decision; indeed, it entirely accords with *U. S. v. Merz*, 310 F. 2d 39.

#### **F. Decision Presumes Without Basis Violation Of Oaths By Commissioners:**

The decision of Fifth Circuit presumes illegally that Commissioners violated their oaths, disregarded instructions of Trial Court, and considered claimed incompetent evidence, in effort to sustain a strained construction of Rules 52 and 53.

The decision sought to be reversed continues:

"On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion as to whether the sales sustain a value of \$100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:

"I arrived at it like I'd price mine, just like it is; (fol. 122) that's what it would take to buy mine adjoining Hoke's."

"If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value."

R. 117-118.

In the first place, the only reference to allegedly comparable sales in the Record are found on pages 35, par. 7, page 37, par. 1, (as to the Lindsey tract); page 46, par. 1 and 2, (as to Watson tract); and page 91, par. 1 and 2, page 92, par. 7, page 93, par. 10 and pages 95-96, par. 5, (as to the Gibson tract). In none of these cases did the U. S. offer the alleged comparable sales as direct or independent evidence but only as the basis for its witness's opinion of value. In the Watson case, Landowner contended that there was no comparable sale; in the Lindsey case, Landowner introduced only one comparable sale by W. O. Sellers; and in the

Gibson case, the Landowner introduced five sales as comparable sales, varying in price range of \$75.00 to \$111.00 per acre or an average of approximately \$86.00 per acre.

The quoted language from the decision of the Fifth Circuit refers to a comparable sale introduced in the *Lindsey* case. The original transcripts of the evidence were before the Fifth Circuit Court of Appeals. It overlooked that this sale was in excess of \$100.00 per acre. There is certainly no proof in the record or any reason to infer that the Commission arbitrarily scaled down other opinions of value. The reference to the testimony of Mr. H. P. Mason (R. 35) who was a neighbor of Mr. Lindsey and owned the adjoining tract that he arrived at his opinion of value "like I'd price mine, just like it is; that's what it would take to buy mine adjoining Hoke's" (R. 118) is not all that was in the record as to this neighbor's qualifications. See (R. 35). The transcript revealed further preliminary qualifying questions and answers which the Fifth Circuit overlooked. The holding that such an opinion is without probative value is erroneous. However, if correct, this did not require remand for detailed evidentiary findings.

An adjoining Landowner is presumably qualified to testify as to the fair value of his neighbor's land as to which he is familiar. Mr. Mason did not say that he was not a willing seller. He did say that \$150.00 per acre was what it would take to buy his land adjoining Mr. Lindsey's land. This does not utterly destroy the

probative value of his testimony although it might affect its credibility. Actually, the fact that his land adjoined that of Lindsey and as such had similar characteristics gave substance to his opinion of value of Lindsey's condemned tract.

However, if Mr. Mason's testimony be deemed inadmissible, there was no objection to same nor any motion to strike it from the record. If it be deemed stricken, there was more than ample evidence to sustain the award. If it be deemed incompetent, and without probative value, the presumptions are (1) that the Commission considered only competent evidence, and (2) that all conflicts in the evidence were resolved in favor of the prevailing party, and (3) the reviewing Court must take that view of the evidence most favorable to the prevailing party. The following authorities support these rules of law:

*U. S. v. Hirsch* (2nd Cir., 1953) 206 F. 2d 289 (1);  
*Morris v. Williams* (8th Cir., 1945) 149 F. 2d 703  
 (12);

*Donnelly Garment Co. v. N.L.R.B.* (8th Cir., 1941)  
 123 F. 2d 215 (10);

*Anglo California Nat. Bank of San Francisco  
 v. Lazard*, (9th Cir., 1939) 106 F. 2d 693 (29,  
 30);

*Thompson v. Baltimore* (8th Cir., 1946) 155 F. 2d  
 767 (3, 4);

*Hedrick v. Perry* (10th Cir., 1939) 102 F. 2d 802  
 (5, 14, 15);

*Bailey v. Sears Roebuck & Co.* (9th Cir., 1940)  
 115 F. 2d 904 (8);

*U. S. v. Foster* (9th Cir., 1941) 123 F. 2d 32 (1);

- Stone v. Farnell* (9th Cir., 1956) 239 F. 2d 750 (9, 18, 19);
- Stacher v. U. S.* (9th Cir., 1958) 258 F. 2d 112 (3);
- U. S. v. Comstock Extension Mining Co.* (9th Cir., 1954) 214 F. 2d 400 (4);
- Freightways, Inc. v. Stafford* (8th Cir., 1955) 217 F. 2d 831 (9);
- Judd v. Wasie* (8th Cir., 1954) 211 F. 2d 826 (2) (3) (5);
- Peterson v. Denévan* (8th Cir., 1949) 177 F. 2d 411 (1) (2);
- Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co.* (6th Cir., 1940) 110 F. 2d 192 (10);
- Wingate v. Bercut* (9th Cir., 1945) 146 F. 2d 725 (2).

**G. The Decision Overlooked All Rules Of Construction Of Findings.**

"It is not the function of this Court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. F.R. Civ. P. Rule 52 (a), 28 U.S.C.A. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous. Appellant has not carried the burden as to any particular challenged finding sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial

"court's written memorandum." (Emphasis ours.)

*Glens Falls Indemnity Company v. United States*,  
229 F. 2d 370, 373 (9th Cir., 1955).

To same effect:

*U. S. v. Yellow Cab Co.*, (1949) 338 U.S. 338

(1) (2) (4), 70 S. Ct. 177;

*Travelers Insurance Company v. Dunn*, (5th Cir.,  
1956) 228 F. 2d 629, 630, 631;

*Zimmerman v. Montour Railroad Company, Inc.*,  
(3rd Cir., 1961) 296 F. 2d 97;

*Blumenthal v. U. S.*, (3rd Cir., 1962) 306 F. 2d  
16 (1);

*Switzer Brothers, Inc. v. Locklin*, (7th Cir., 1961)  
297 F. 2d 39;

*U. S. v. Foster*, (9th Cir., 1941) 123 F. 2d 32;

*Stone v. Farnell*, (9th Cir., 1956) 239 F. 2d 750;

*Rapid Transit Company v. U. S.*, (10th Cir., 1961)  
295 F. 2d 465, 467.

"Findings of the trial court are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn."

5 Moore's Federal Practice, pp. 2660, 2661.

The decision impresses upon an appellate court a supervisory role over findings of fact, which is not the scope of an appeal. What the U. S. sought in the instant cases is a retrial on an appellate level, and the decision of the Fifth Circuit, in effect, adopts such a procedure, contrary to authority, and clearly violative

of the requirement of Rule 52 that findings not be set aside unless clearly erroneous.

Taking each objection of U. S., Landowners specify the following fatal defects:

Objection No. 1—(R. 108) Failed to order Commissioners to make complete findings of fact and conclusions of law. The objection fails to specify in what respects the findings and conclusions were incomplete or inadequate. Therefore, this is not entitled to be termed an objection in the first instance.

Objection No. 2—(R. 108) Findings were inadequate to determine basis on which the awards were made. Again, if the U. S. was trying to state that the findings were inadequate in that they did not state what evidence the Master believed and disbelieved, it should have said so in express language. The objection as phrased is so vague as to raise no question for review. An award can only be based upon evidence and the view of the land as an aid in the weighing of the evidence. The Commission summarized the evidence before it. Had the objection been sufficiently specific, it would have been without merit, since under the law cited herein, such findings are not required.

Objection No. 3—(R. 108) Reports showed conflicts in the evidence but do not show how these conflicts were resolved. The specific conflicts were not identified. Of course, there were conflicting opinions as to value. Of course there were conflicting contentions.

as to whether Landowners' sales were comparable. It is manifest, however, that the Commission (1) rejected the opinion of the Appellant's expert witnesses and the allegedly comparable sales on which they were partially based since their opinions and the allegedly comparable sales were thoroughly discredited on cross examination, and (2) did not accept as correct any opinion evidence, or any sale as identical, but arrived at its own independent finding of value after weighing all the evidence. This it not only had a right, but was under a sworn duty to do.

If Rule 52 (a) required the Court to state what evidence it credited and what evidence it discredited, it is not reversible error not so to do if the Trial Court's judgment leaves no doubt as to what evidence the Trial Court accepted in rendering its award. See *Hazeltine Corporation v. General Motors Corporation*, (3rd Cir., 1942) 131 F. 2d 34 (5).

Applying the foregoing principle to the instant cases, the decision of the Fifth Circuit violates this rule of law. From the summaries of the evidence recited in the Master's Reports (R. 33-38, *Lindsey* case; R. 43-47, *Watson* case; and R. 91-96, *Gibson* case), the following conclusions are apparent. In the *Lindsey* case, the opinions of the Landowners' witnesses ranged from \$90.00 to \$150.00 per acre; the U. S. witness testified to approximately \$59.00 per acre; the Master found \$100.00 per acre. In the *Watson* case, the range of Landowners' witnesses opinions of value was \$130.00 to \$240.00 per acre; the two Government witnesses

testified to \$87.50 and \$94.00 per acre value; and the Commission found approximately \$160.00 per acre. In the Gibson case the opinions of Landowners' witnesses ranged from \$83.00 to \$100.00 per acre as to the River Land; from \$60.00 to \$85.00 per acre as to the lands east of the Highway or the uplands, and an average overall value per acre of approximately \$81.00; the Government's witness testified to an average value of \$43.00 per acre and assigned a value of \$50.00 per acre to the River Land and \$35.00 per acre to the upland; the Commission found approximately \$81.00 per acre. The only conclusion that can be drawn from the foregoing is that the Commission in each case rejected the opinion values of the Government witnesses and the claimed comparable sales upon which they were based. That the awards more nearly approximated the average opinion values of Landowners' witnesses impeaches neither the impartiality nor the correctness of the findings. *U. S. v. Yellow Cab Co.*, (1949) 338 U.S. 338 (1), 70 S. Ct. 177.

**H. The Decision Erroneously Entrenches Upon The Prerogative Of The Trial Court To Determine Adequacy Of Findings In The First Instance.**

The decision states that "In order that District Court may review the Commissioners, it must be able to determine whether the Commission adopted the correct legal principles, and whether the evidence met the standard of substantiality to withstand a reversal by the district court. (R. 118.)

There is nothing in the Record to suggest that the Trial Court did not deem himself capable of reviewing the awards of the Commissioners because of inadequacy of findings. Further, there is nothing in the Record to suggest that the Commission adopted erroneous legal principles in arriving at its awards. The trial judge adopted the reports after reviewing the transcript of the evidence. The Fifth Circuit did not review the transcripts of the evidence. In adopting the reports of the Commission the Trial Court determined that the awards were supported by substantial evidence. The inference from the above quotation is that the Trial Court, in reviewing the Commission, must search the souls of the Commissioners and cross examine them to determine if they violated the instructions of the Trial Court, even without the remotest suggestion by the U. S. Such is not the proper scope of review, either by the Trial Court, or by an intermediate Court.

"In condemnation proceedings involving determination of real estate values, court of review may only check the general processes on which the result rests, to see that they do not indicate such arbitrariness as would make the trial and its result a violation of due process."

*Phillips v. United States*, (2nd Cir., 1945) 148 F. 2d 714 (4).

The decision of *U. S. v. Leavell & Ponder, Inc.*, 286 F. 2d 398, quoted by the Court of Appeals (R, 118) is not only not in point; it does not even relate to any issue before the Court of Appeals in the instant cases.

The language used in the opinion in *Leavell and Ponder, Inc.* case, *supra*, emphasizes the clear thread of distinction noted heretofore. It reads:

"The figure (condemnee's net gain) arrived by the Commissioners would much better have been supported by subsidiary findings of fact. At least a finding as to the need for replacing the cash reserves for depreciation for short-lived equipment would have been almost essential to an understanding of the figure. Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum. See *United States v. Buhler*, 5 Cir., 254 F. 2d 376, 882. Moreover, the commissioners erred in assuming that the total would have been received in one lump sum at the end of the 43 years. It is perfectly clear from the record that any computation based on such assumption would be erroneous, since the rentals are payable over the life of the lease."

*United States v. Leavell & Ponder, Inc.*, (1961)  
286 F. 2d 398, 406.

This case involved a complex condemnation of a Wherry Housing Lease, and the need for replacing cash reserves for depreciation of short-lived equipment materially affected the condemnee's net gain figure (as to this key subject no finding was made); and in addition, the Commission assumed the receipt of this net gain at the end of the 43 year term, whereas the rentals were payable over the life of the lease. That case is to be contrasted with the simplicity of the instant cases.

Generally speaking, where the subject being valued is ordinary farm land, the appellate court is not concerned whether the award is a product or a sum of the elements. It generally is concerned only with errors or law, insufficiency of the evidence to support the award, or whether the findings made were within the range of competent evidence.

The decision sought to be reversed quotes general language from *U. S. v. Forness*, 125 F. 2d 928; 942, as to the purpose served by findings of fact, as aiding in the process of decision. The *Forness* case dismissed a complaint for cancellation of a lease for nonpayment of rent, and the trier of fact made no independent findings of fact but included the proposed findings and objections in the record, which the Second Circuit condemned as a bad practice. It is not remotely in point.

Finally, the decision concludes that in order for the reports to meet the standards prescribed, the judgments are reversed and the cases are remanded to the Trial Court for resubmission. A casual reading shows that no standards are prescribed in the opinion. In fact, the opinion is much more vague than the reports which it purports to criticize. The opinion in the final analysis, is a collection of general quotations that adds only confusion to the proper interpretation and application of Rules 52 and 53. It destroys the utility of Commissions, and imposes an intolerable burden on

trial judges to take each piece of evidence and say "I believed this witness, I didn't believe that witness, I paid little attention to that witness." Of course, the trial judge must then add why he chose to do so. Instead of findings of fact, the decision makes "for scrambled eggs instead of chicks", aside from its ignoring the importance of and requirement of the rule that due allowance be made for (1) the pre-eminence of the Trial Court to determine credibility of witnesses and (2) the importance of the view of the land which placed the Commissioners in a position to weigh the testimony which the Trial Court did not enjoy and as to which the decision of the Fifth Circuit chooses to disregard.

Landowners respectfully pray that the decision of the Fifth Circuit Court of Appeals be reversed. It is in conflict with *U. S. v. Jacobs*, (5th Cir., 1962) 308 F. 2d 906 (2) and even *Leonard M. Bernes v. Edward J. Henning*, 310 F. 2d 127, decided by the same judges who decided the instant case which held:

"Where only issue on appeal was one of fact, and reviewing court could not determine that judgment of trial court approving findings of special master was clearly erroneous, judgment would be affirmed."

*Leonard M. Bernes v. Edward J. Henning*, (5th Cir., 1962) 310 F. 2d 127.

The plain departure from established law by the decision of the Fifth Circuit is made obvious by the even more general language:

"We do not say that every contested issue raised on the record before the Commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based."

R. 117.

There was only one contested issue—namely just compensation. The only subsidiary facts involved were:

- (1) Fair market value of land taken,
- (2) Severance damage to remainder of tract not taken,
- (3) Value of flowage easements,
- (4) In the *Lindsey* case, severance damage to his homeplace which was not contiguous to the land taken; and
- (5) In the *Watson* case, whether the land was valuable for residential purposes.

Findings of these subsidiary facts were made. Whether a factfinder accepts a witness's opinion of value as credible or accepts a sale as comparable is

not a subsidiary underlying ultimate fact, but a part of the process of decision, or reasoning on the evidence and its effect.

### CONCLUSION.

"There can be no doubt that the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception. To entitle himself to relief from a verdict, order or judgment, a party must show that his case is within the exception. Error is not to be presumed but must be affirmatively shown. And the appellate courts will disregard harmless errors and reverse only for errors prejudicial to substantial rights of the parties. Thus in *Palmer v. Hoffman*, Mr. Justice Douglas pointed out that 'Mere "technical errors" which do not "affect the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.' And in *Commercial Credit Corp. v. United States*, Chief Judge Gardner, for the Eighth Circuit, observed that 'Error is not ground for reversal unless it be prejudicial. - It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant.'"

As Justice Cardozo once stated:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."

*United States v. Swift & Co.*, (1932) 286 U. S. 106, 119, 52 S.Ct. 460, 464.

This Court has recognized the requirement of harmful error on numerous occasions. Two such statements of the rule follow.

"Mere error is not enough to require reversal of the judgment if the record discloses that no injury could have resulted therefrom."

*Carlisle Packing Co. v. Sandanger*, (1922) 259 U. S. 255, 42 S. Ct. 475 (2).

"To warrant the reversal of a judgment, there must be not only error found in the record but the error must be such as may have worked injury to the party complaining."

*Decatur Bank v. St. Louis Bank*, 88 U. S. 294, 21 Wall 294, 22 L.Ed. 560.

Had the Fifth Circuit followed the above maxims, and, indeed, had it followed its own prior decisions on

the subject, it could only have affirmed the judgments. We respectfully request this Court to reverse the decision of the Fifth Circuit and reinstate the judgments of the Trial Court.

W. LOWREY STONE,

LOWREY S. STONE,  
Blakely, Georgia,

JESSE G. BOWLES,  
Cuthbert, Georgia,

FORREST L. CHAMPION, JR.,  
Post Office Box 1975,  
Columbus, Georgia 31902,  
Counsel for Petitioners.

---

**CERTIFICATE OF SERVICE.**

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the . . . day of August, 1963, I served copies of the foregoing Brief for the Petitioners to the United States Court of Appeals for the Fifth Circuit on the United States of America, Respondent, as follows:

1. By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,  
Assistant Attorney General,  
Washington, D. C.

Messrs. S. Billingsley Hill and Hugh Nugent,  
Attorneys, Department of Justice,  
Washington, D. C.,

Mr. Floyd M. Buford,  
United States Attorney,  
Macon, Georgia.

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

FORREST L. CHAMPION, JR.,  
Attorney for Petitioners,  
Post Office Box 1975,  
Columbus, Georgia 31902.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

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**No. 79**

**2,872.88 ACRES OF LAND, ETC., ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The district court did not write an opinion. The opinion of the court of appeals (R. 112) is reported at 310 F.2d 775.

**JURISDICTION**

The judgments of the court of appeals were entered on December 5, 1962 (R. 119-120). A timely petition for rehearing was denied on January 3, 1963 (R. 121). The petition for a writ of certiorari was filed

on February 21, 1963, and was granted on April 22, 1963 (R. 122). 372 U.S. 975.<sup>1</sup> The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether, in an eminent domain proceeding, a district court may adopt the reports of a commission it has appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the issue of just compensation, if the reports fail to show the basis upon which the commission's awards were made and how the commission resolved major conflicts in testimony.

2. Whether, under Rule 53(e) (2) of the Federal Rules of Civil Procedure, objections to the merits of a condemnation commission's awards must be joined with objections to the inadequacy of the report, if the report, as filed, fails to disclose the basis for the awards.

### RULES INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides, in pertinent part:

(e) Report.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of

<sup>1</sup> At the same time, certiorari was granted in No. 65, *United States v. Merz*, 306 F.2d 39 (C.A. 10), 372 U.S. 974.

the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Rule 71A of the Federal Rules of Civil Procedure provides, in pertinent part:

**(h) Trial.**

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and

report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

### STATEMENT

These condemnation suits are part of the land acquisition program for the Walter F. George Lock and Dam Project on the Chattahoochee River in Georgia and Alabama. Three series of tracts are involved. The first, known as the Lindsey property, concerns approximately 1015 acres taken in fee and four perpetual flowage easements over tracts ranging from 1.80 to 3.40 acres (R. 32-33). The second, belonging to petitioner Watson, involves about 330 acres taken in fee and a perpetual flowage easement over another 7.58 acres (R. 41). The third, belonging to the Gavin family, relates to approximately 1345 acres taken in fee, four perpetual flowage easements over tracts varying from 2.07 acres to 10.79 acres, and four perpetual road easements over tracts ranging from .8 acres to 5.8 acres (R. 90). Notwithstanding the government's demand for a jury trial of the issue of just compensation (R. 7, 75), the district court referred that issue to a commission pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure. The commission was given instructions by the district court on how to proceed and what to consider (R. 18, 21-26).

The commissioners viewed the property, held hearings, and filed their reports. The three reports followed the same pattern (R. 32-40, 41-49, 89-99):

(1) Each began with a notation as to the times and places when the hearings were held; (2) This was followed by a brief statement listing the owners of the land and the interests which were taken in fee or subjected to easements; (3) Next came a summary of the evidence, consisting mainly of capsule resumes of the testimony of all witnesses, including references to the bases of their valuations and the figures to which they testified; (4) "Findings of Fact" followed. These set forth who owned the land, its highest and best use, the acreage remaining after the taking and the amount of severance damage to it, the value of the fees taken and of each easement, and the total awards; (5) Each concluded with "Conclusions of Law," which stated that the United States had the right to take the land; that the landowners were entitled to just compensation including severance damages, and that the commission had jurisdiction to determine the amount of just compensation. In the report pertaining to the Gavin property, the commission also overruled, in a "Conclusion of Law," government objections to evidence of a comparable sale offered by the landowners (R. 99, Par. 4).

The government filed objections to each of the reports, including the following, *inter alia* (R. 50, 53, 100):

1. The Report does not contain sufficient specific findings as to the matters on which the Commissioners based their valuation.

2. The Report does not sufficiently set forth the principles of law which the Commissioners applied in arriving at their conclusion as to value.

The government also objected on the ground that the awards were excessive, that they were outside the range of the testimony and against the weight of the evidence, and that they showed that the commissioners disregarded recent sales of similar properties (R. 50, 53, 100). Each set of objections also specified some particular testimony which was erroneously admitted into evidence by the commissioners and observed that it was "impossible to determine to what extent, if any, this testimony entered into the Commissioners valuation" (R. 51, 53, 100).

The district court overruled the objections and adopted the reports, saying in each instance that it had carefully considered the "report, objections and briefs" (R. 55, 56, 102). The court then entered judgments for the amounts awarded by the commissioners (R. 57, 60, 103). The government appealed, specifying as error the district court's adoption of the commission's inadequate reports (R. 108-109).

The court of appeals noted that the reports did not indicate (1) which evidence the commission credited and which it discredited, (2) to what extent the awards were based on testimony of comparable sales, (3) whether sales were in fact comparable, and (4) to what extent the awards depended on the opinions of non-expert witnesses (R. 114). It held that a commission's report must contain "sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based" (R. 117). Accordingly, the court of appeals remanded the cases "for resubmission in order that the commissioner's reports may

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meet the standards prescribed" in the court's opinion (R. 119-121).

## SUMMARY OF ARGUMENT

### I.

For the reasons elaborated in our brief on the merits in *United States v. Merz*, No. 65, a condemnation commission's report does not satisfy the standards of the applicable Federal Rules of Civil Procedure if it fails to state the facts and the law upon which the commission's award is based. A district court with which such a report is filed is obliged to recommit the case to the commission for more complete findings. Although the reports of the commission in the present case summarized the evidence, they contained no findings as to particular determinative facts on which testimony conflicted. Nor did they demonstrate the use to which the commission had put testimony of comparable sales. Consequently, it was impossible for the district court to review the awards pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure in order to determine whether they were "clearly erroneous," and the court of appeals was correct in remanding the case so as to obtain adequate findings.

### II.

Since the commission's reports were conclusory and gave no indication as to the method or the reasoning by which the awards were made, it was impossible for the government to do more in the district

court than to challenge the form of the reports and object generally to the size of the awards. In the absence of any indication of the commission's *ratio decidendi*, there was also no cognizable legal basis upon which to contend in the court of appeals that the awards were excessive, or that they could not reasonably be derived from the evidence.

## ARGUMENT

### I.

#### **The Commission's Reports Failed To Articulate Subsidiary Findings and Legal Reasoning With Sufficient Particularity To Permit Meaningful Judicial Review**

In our brief on the merits in *Merz v. United States*, No. 65 (pp. 14-24), which has been supplied to petitioners in this case, we elaborate the reasons why a condemnation commission must include in its report findings "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion \* \* \* can rationally be predicated." *Kelley v. Everglades Drainage District*, 319 U.S. 415, 420. The reports in the present case did not meet this standard, and their deficiencies could not be filled by the district court. (See *Merz* brief, pp. 26-30.) Consequently, the court of appeals was correct in directing that the case be remanded to the commission for adequate findings.

#### **A. Conflicts in testimony were not resolved.**

The reports in the present case are strikingly similar to those in *Merz* in every respect but one. Like the reports in *Merz* they include a recitation of many

undisputed facts, some of which were totally unrelated to the commission's single function of determining just compensation—i.e., the names of the landowners, the precise date of the taking, the location of the tracts, the highest and best use of the land, and the interests taken. The reports also include legal conclusions on incontrovertible propositions—i.e., that the United States was entitled to condemn the land, that the landowners were entitled to just compensation, and that the commission had jurisdiction to determine the amount of the compensation.

In one respect the reports are more complete than were those in *Merz*. Unlike the *Merz* reports, the commission's reports in the present case summarize the testimony of the witnesses who appeared before it (R. 33-38, 42-47, 91-96). Such summaries are desirable components of commission reports both because they disclose to a reviewing court, compendiously, the evidence which was before the commission, and because they focus the attention of the commissioners on the evidence presented to them. (See *Merz* brief, pp. 21-23.) But the requirement that the commission submit full findings to the district court, which is implicit in Rules 71A(h) and 53(e)(2) of the Federal Rules of Civil Procedure, is not satisfied by a mere summary, particularly when, as here, the summary discloses that there were major conflicts in the testimony. Only the commissioners know how the conflicts were resolved, and only by knowing the commissioners' resolutions of the conflicts, and the inferences based upon them, can a district court or a court of

appeals meaningfully examine the commission's conclusions and determine whether they were warranted by the evidence or were "clearly erroneous."<sup>2</sup>

An analysis of the three reports in issue in this case discloses substantial differences in testimony as to which the commission failed to articulate conclusions. It also demonstrates that the commission must have committed errors which cannot be precisely identified because of the generality of its findings.

(1) The *Lindsey* property.—The land taken in fee was valued by the landowner at \$140 an acre and by other lay witnesses who testified in his behalf at \$110 to \$150 per acre (R. 34-35). The landowner's expert witness testified, according to one computation, to a value of approximately \$85 per acre (R. 36). The government's expert witness valued the land at approximately \$56 per acre (R. 37). While making no specific finding either as to the per-acre value of the property or as to the total value of the full parcel from which the condemned tract was taken, the commission entered an award for the fee interest of approximately \$94 per acre (R. 39).

Another element of the award was severance damages to the parcel of land remaining after approxi-

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<sup>2</sup> We note here, as we did in the *Merz* brief (p. 27, note 14), that the proper standard by which the court of appeals should review commission-tried condemnation cases is by determining whether the commission's findings are "clearly erroneous." Judge Tuttle's statement to the contrary in the present case (R. 118) should be compared with his dissent in *United States v. Twin City Power Co. of Georgia*, 253 F.2d 197, 205 (C.A. 5), which states what appears to us to be the correct rule.

mately two-thirds of the original property had been taken. The landowner contended that not only did the taking leave the remainder of the property "over-improved" and deprive it of its water supply, but that his "home place," an 86-acre tract which was four miles away, was damaged in the amount of \$15,000 (R. 34). Other supporting lay witnesses testified that the remaining 500-odd acres had been reduced in value by amounts ranging from \$45 to \$70 per acre (R. 35). The landowner's expert witness testified to \$26,635 in severance damages, of which \$14,200 was attributable to the alleged reduction in value of the landowner's home place (R. 36). The government's expert valued severance damages at \$1,825 in all, making no allowance for the alleged damage to the home place but including an estimate for fencing and necessary road construction (R. 37). The commission found specifically that no damage had been caused to the home place (R. 38), but it nonetheless set severance damages at \$15,785 (R. 39). How it arrived at this figure was not disclosed, but it was obviously in excess of the estimate set by the landowner's expert, whose severance figure, apart from damage to the home place, would have come to \$12,435. Nor did the total figure reveal whether the commission had considered fencing and road construction costs.

Since the commission's report regarding the Lindsey property did not state on whose testimony the commission relied, or whether it arrived at its estimates by a compromise method, it is impossible to pinpoint the error in the commission's award. However, it is

certainly a fair supposition, as the court of appeals observed, that the commission gave substantial credence "to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case" (R. 114). The bare fact that the awards for the fee interest and for severance damages to the remainder exceeded the valuation given by the landowner's own expert indicates as much.

(2) The *Watson* property.—The landowner's expert witness testified that he could find no comparable sales by which to evaluate the 330-odd acres which were taken in fee from an original parcel of approximately 400 acres (R. 41, 43, 48). Basing his valuation on his general experience and on the productivity and rental value of the property, he valued the full 400 acres at \$52,500 (R. 44). In another computation he assessed the tract which was taken in fee at \$36,125 to which he added \$12,700 for improvements (R. 44). The landowner testified that the full 400-acre parcel was worth \$96,000 before the taking, and that what was left was worth only \$2,800 (R. 45). He also valued improvements separately at \$34,430 (R. 45). Two lay witnesses testified to values of approximately \$200 per acre (R. 44-45). The government's experts did not value improvements separately. Their estimates, based upon five comparable sales, assessed the fee interest at approximately \$34,500 and \$33,000 (R. 46-47). The commission made no separate find-

ing as to the value of the improvements, nor did it mention whether it had considered the value of improvements as an element in its award for the fee interest. The commission also failed to state whether it accepted the government expert's comparable sales or whether it agreed with petitioner's expert that there were no sales that could be considered comparable. It awarded \$52,950, a sum in excess of the valuation placed on the full 400 acres by the landowner's expert witness, as compensation for the taking of approximately 330 acres (R. 48).

The commission separately awarded \$3,500 for severance damages to the remainder of the 400-acre property (R. 48). The only testimony concerning severance damages which is reflected in the reports was that of the landowner's expert, who gave a combined figure of \$1,275 for the value of the easement and severance damages (R. 44), and that of the government's experts, who assessed severance at \$225 and \$250 (R. 46-47). Here too, the commission's failure to make any express finding as to the witnesses on whom it relied conceals the probability that its award was based largely on the testimony of those who lacked the knowledge needed for a reliable judgment.

(3) *The Gavin property.*—The land taken in fee was composed of approximately 435 acres west of Georgia Highway 39 and about 900 acres east of the highway (R. 92-93). Five of the landowners' lay witnesses (R. 92-95), one of the landowners (R. 93), and the landowners' expert (R. 94) all testified that the property west of the highway was more valuable

than that east of the highway. Nearly all of the lay witnesses valued the property west of the highway at \$100 per acre, but the landowners' expert assessed it at \$83 per acre (R. 94). The value of the land east of the highway was estimated by the landowner at \$85 per acre, by the lay witnesses at \$60 to \$80 per acre, and by the expert at \$65 per acre. The expert's estimate of the total value of both parcels came to \$93,693 (R. 94). The commission's award, which was a blanket figure of \$105,080 (R. 97), exceeded this valuation, as well as the government expert's valuation of \$56,100 (R. 96). The Commission did not indicate whether it had considered the two parcels separately and valued them differently, adding the results together, or whether it had valued them as a unit, as had the government expert. Nor did the report reveal whose testimony the commission had adopted on the per-acre value of the property.

The commission also awarded severance damages of \$4,480 for four remaining parcels totaling about 225 acres (R. 97). There was no indication in the report whether this amount was based on a per-acre estimate, whether it may have rested upon the testimony of one witness that severance damages should be doubled if the land were to become "water sogged" (R. 92), whether it was the result of the landowner's estimate that the remaining land would depreciate by 25 percent of its value (R. 93), or whether it was produced by the testimony of the landowner's expert that severance damage should equal 10 percent of the value of the land plus the cost of fencing (R. 94). Indeed, there is nothing in the report to reveal whether the commission took any account what-

ever of the cost of fencing the remaining property, which had been estimated by the landowners and their witnesses at costs ranging from \$3,000 to almost \$4,500 (R. 93-95).

In summary, all three reports left unanswered most of the significant questions raised by conflicting testimony. Because there was nothing in the record before the district court informing it on what basis the commission arrived at its findings, that court could not perform its prescribed function of determining whether the findings were clearly erroneous. The district court was not given the slightest clue as to why the commissioners selected the figures they did instead of others for which there was supporting evidence. The most reasonable inference was that, for some unstated reason, the commissioners improperly rejected the testimony of all experts—both the government's and the landowners'—and relied primarily on valuations given by the landowners and other minimally qualified witnesses. The commission, which consistently awarded more than the landowners' experts estimated, apparently abandoned the testimony of those witnesses who displayed real familiarity with market conditions and relied instead upon the word of lay witnesses, some of whom owned land taken in the same project. Opinion evidence by an unqualified witness should have been disregarded, but the results reached in these cases suggest that such evidence was given substantial weight.

**B. Comparable sales were neither accepted nor rejected.**

Petitioners acknowledge (Brief, pp. 45-46) that "truly comparable sales \* \* \* are the highest and best evidence of market value." As stated in *Baetjer v. United States*, 148 F.2d 391, 397 (C.A. 1), certiorari denied, 323 U.S. 772: "What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available." Consequently, it is only "in the absence of such sales" (*United States v. 13,255.53 Acres of Land in Burlington & Ocean Counties*, 158 F.2d 874, 876 (C.A. 3)), that opinion evidence should be given weight in determining just compensation. The reports in this case, which do not evaluate the evidence of comparable sales, afforded the district court no means of determining whether the commissioners properly relied (or unduly relied) upon other evidence.

All three reports mention testimony by government experts about comparable sales (R. 36-37, 45-46, R. 95-96), but none indicates whether the commission accepted the sales as comparable or whether it thought that they supported the values based upon them. The landowners offered no evidence of comparable sales with respect to the Watson property, one allegedly comparable sale regarding the Lindsey property, and five with respect to the Gavin property. The Watson award of \$52,950 exceeded by at least \$18,125 the higher of the two opinions offered by government experts on the basis of comparable sales (R. 45-46). The Lindsey report does not show the price of

acreage of the landowner's one comparable sale (R. 35), but it does demonstrate that the award of \$112,615 exceeded by \$53,990 the sole opinion based on comparable sales (R. 36-37). It seems clear, therefore, that the Watson and Lindsey awards did not represent market value based on comparable sales.

Nor did the five sales offered by the Gavin landowners support the award in that case. Four of the five sales were of tracts ranging in size from 120 to 202.5 acres (R. 91), and the condemned tract consisted of some 1345 acres (R. 90). The commission's report gave no indication whether sales figures were adjusted in order to make these four transactions comparable to the sale of a tract at least six times the size of the allegedly comparable parcels. Moreover, there was no clear statement in the summary of testimony or in the findings whether one of these tracts was 135 or 160 acres—a difference which would cause the price per acre to vary some 20 percent (R. 91). The fifth comparable sale relied upon by the landowners was of comparable size, 1432 acres, but the report reflects some confusion as to the price (R. 92). At best, the selling price in that transaction was \$63 or \$73 an acre—a valuation which clearly fails to support the more-than-\$75-per-acre award. And the \$105,080 award substantially exceeds the only opinion based upon comparable sales (R. 95-96). In light of these circumstances, it is not surprising that the Fifth Circuit wondered whether comparable sales supported the awards (R. 117-118).<sup>3</sup>

<sup>3</sup> Petitioners twice allude to the fact that when they used comparable sales, they offered them as direct evidence of

Since comparable sales are the best evidence of market value and are to be preferred over other evidence, the commission's reports should disclose whether evidence of comparable sales was accorded the preference to which it is ordinarily entitled. If it was not, then the reports should show why it was rejected. In short, we submit that in determining fair market value, the commissioners either must rely on the comparable sales evidence or must reject it for specific reasons before giving substantial weight to any other evidence. Only if the court knows what the commission's reasons are can it tell whether they are legally adequate. Cf. *United States v. Lowrie*, 246 F.2d 472 (C.A. 4).

**C. Findings of "preliminary and basic facts" are necessary for meaningful judicial review of condemnation cases.**

Petitioners contend that the commission's reports need articulate only "ultimate facts" in order to satisfy Rules 71A(h) and 53(e)(2) of the Federal Rules of Civil Procedure (Brief 10-33). If the words "ulti-

value, whereas the government used them only in support of an expert's opinion of market value (Brief, pp. 6, 58). At a third point, they say that "there was nothing else for the Commission to consider save opinion evidence and the comparable sales introduced by Landowners \* \* \*" (Brief, p. 31). If the commissioners thought, as petitioners obviously do, that they must ignore the government's comparable sales, because they were introduced in the course of testimony by an expert witness and used as a basis for his expert valuation, their reports should have said so. This would have raised a legal issue which could be judicially determined on its merits.

mate facts" mean the end product of the factual inquiry—i.e., the factual conclusion based upon a number of resolutions of factual conflicts and inferences therefrom—this proposed standard is clearly contrary to this Court's holdings regarding the adequacy of findings for judicial review. The standard prescribed in *Kelley v. Everglades Drainage District*, 319 U.S. 415, 420, is that findings should be made "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion \* \* \* can rationally be predicated." (Emphasis added.) The necessity for more than an ultimate award was demonstrated in *Hatchley v. United States*, 351 U.S. 173, in which an aggregate damage award was vacated because it was "totally inadequate for review." 351 U.S. at 182. And in *Dalehite v. United States*, 346 U.S. 15, 24 n. 8, this Court warned, "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied." (Emphasis added.)

Findings of "preliminary and basic facts" are imperative for adequate review of the awards of condemnation commissions. The only matter before the commission is the question of just compensation. When a fee interest has been taken, the "ultimate" question for the commission to decide is the market value of that fee interest. If the commission were able to satisfy its obligation to make findings simply by entering a figure which is within the range of the testimony, it would thereby render its award totally immune from effective judicial review. Obviously,

it was not the intention of the draftsmen of Rule 71A(h), who contemplated that the commission would make findings and that these would be reviewed judicially in accordance with the standards of Rule 53 (e) (2), to leave commissioners so completely at large.

A requirement that "preliminary and basic facts" be stated in commission reports does not mean that commissions will have to set out evidentiary fact findings in infinitesimal detail. Authorities cited by petitioners in which the governing principle has been stated in terms of "ultimate facts" have used these words to distinguish findings on significant and pertinent matters from those relating only to evidentiary detail. The guideline as to the adequacy of findings is whether they provide a sufficiently informative explanation of the premises upon which the commission acted and the inferences it drew to enable the reviewing court to conduct an intelligent examination of the validity of the commission's conclusions.

Petitioners stress the simplicity of the issues in the three cases here involved. We agree that the valuation of "ordinary farm, timber and pasture land" should not present serious difficulties. Nonetheless, the parties went to trial with vast differences as to valuation. (See pp. 10-15, *supra*.) In order to determine whether the commission's approach to these differences was correct under existing principles of law and whether its conclusions were based upon the evidence, a reviewing court would need more information than the commission provided here.

It is true that what is an "ultimate fact" in one context might not be an "ultimate fact" in another.

In certain kinds of cases involving masters appointed under Rule 53, questions of valuation might arise which, perhaps, might appropriately be resolved without subsidiary findings.<sup>4</sup> But what might be true of masters is not necessarily true of condemnation commissions. Petitioners labor under the misapprehension that a condemnation commission is merely a group of three masters who determine just compensation in eminent domain cases. If the draftsmen of Rule 71A(h) had intended such a result, they would have provided expressly for the trial of the issue of just compensation before three masters. Instead, Rule 71A(h) establishes a unique system which can operate fairly only if appropriate safeguards are applied to prevent abuse. A necessary safeguard is the requirement that commissions make findings on "subsidiary" and "basic facts."

## II.

**Objections To the Merits of the Awards Could Not Be Made So Long As the Basis for the Awards Was Undisclosed**

### *A. Only general objections could be made in the district court.*

Petitioners contend (Brief, pp. 34-39) that despite the unrevealing form of the commission's reports, the government was required by Rule 53(e)(2) to file specific written objections to the merits of the awards in the district court. The failure to file such specific

<sup>4</sup> But see our brief in *United States v. Merz*, at p. 18, note 10.

objections is asserted as grounds for rejection of the government's principal contention that the reports were inadequate.

Rule 53(e)(2) provides that "[w]ithin 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties." Although permissive in tone, this clause apparently requires objections to be filed within the prescribed time in order to be preserved.

It would be most unreasonable, however, to read Rule 53(e)(2), as petitioners suggest, to require the filing of specific objections to the *merits* of a condemnation commission's award if the report fails to disclose how the commission arrived at the award. Any challenge to the merits of an award would then have to be based upon speculation as to what might have caused the commission to reach the result it did. The only sensible avenue open to the government under these circumstances was to do what it did—i.e., challenge the adequacy of the report's findings and allege generally that the awards were erroneous (R. 50-51, 53, 100).

The anomaly which results from petitioners' proposed rule is best illustrated by considering an extreme hypothetical case. If, for example, a condemnation commission were to file a report containing an award without holding a hearing or giving any of the parties an opportunity to present evidence, the report would obviously be improper and should not be adopted by the district court. The parties would be unable, however, to make any specific objection to the size of the award since they would not know how the

commission had determined it. It hardly seems necessary to observe that a bare objection to the commission's procedure and to the fact that its award was reached without the presentation of evidence would be sufficient to sustain its rejection.

Similarly, when the commission fails to articulate its grounds of decision, a general objection based upon this omission must be adequate to satisfy Rule 53(e)(2).<sup>5</sup>

*B. It was unnecessary to challenge the merits of the awards in the court of appeals.*

Petitioners also contend (Brief, pp. 39-42) that the government's failure to challenge the size of the awards in the designation of points on appeal renders the case moot. This argument was also made in the court of appeals, where it was rejected as being "without merit" (R-113).

The contention is patently frivolous. First, the same reasons which prevented the government from making specific objections in the district court (pp. 21-22, *supra*) continued so long as the commission did not state the premises of its decision. Hence the only cognizable legal ground upon which an appeal

<sup>5</sup> To the extent that there is any intimation to the contrary in *United States v. Lewis*, 308 F.2d 453 (C.A. 9), we think that case was wrongly decided. The court there appeared to say that objections to the adequacy of a report must specify in what manner the report was inadequate. Since a conclusory report conceals the basis of a commission's award, it is often difficult or impossible to pinpoint the particular inadequacy other than by drawing to the court's attention the fact that the report is conclusory in form.

could be based was the commission's failure to meet its obligation to make findings. Second, even if the effect of the government's failure to challenge the merits of the awards in its statement of points on appeal was to permit the court of appeals to refuse to consider any such contention if it was belatedly asserted, see *Jesionowski v. Boston & Maine R. Co.*, 329 U.S. 452, 458-459, it surely did not affect the court's power to pass on other specified claims of error. Finally, it is obvious that a party may contend on appeal that procedural errors were committed in the course of a proceeding without asserting that the decision would be reversible if it followed a fair proceeding. If the Commission had stated the grounds of its decisions fully, its awards might not have been open to attack by either party, but the procedure followed by fairminded and reasonable commissioners, in so important a matter, would presumably influence the outcome. The likelihood is certainly so strong as to entitle both parties to a proceeding in which that procedural right was preserved and the basis of decision laid bare. Furthermore, when there is a patent flaw in the proceeding before the commission which renders judicial review on its awards impossible, either party may first demand the procedures to which it is entitled and thereafter, if still aggrieved by the result, address itself to the merits.\*

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\* In both *United States v. Buhler*, 254 F. 2d 876, reversed, 305 F. 2d 319 (C.A. 5), and in *United States v. Cunningham*, 246 F. 2d 330, reversed, 270 F. 2d 545 (C.A. 4), certiorari denied, 362 U.S. 989, the United States first appealed on the

## CONCLUSION

Three years have passed since the filing of the reports in these cases (August 19, 1960), and it is unreasonable to expect the commissioners now to remember why they reached their awards, even assuming that they are now available for further duty. Accordingly, we believe that the judgments of the court of appeals should be affirmed insofar as they reverse the judgments of the district court, but modified to provide for remand of the cases to the district court for new trials.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

ROGER P. MARQUIS,  
HUGH NUGENT,  
*Attorneys.*

OCTOBER 1963.

merits as well as on the adequacy of the reports. In both instances, the courts of appeals remanded the initial appeals for fuller findings, demonstrating the futility of arguing the merits absent an adequate report.

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# Supreme Court of the United States

OCTOBER TERM, 1963.

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No. 79.

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2,872.88 ACRES OF LAND, ETC., ET AL.,  
Petitioners,

versus

UNITED STATES,  
Respondent.

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On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.

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## REPLY BRIEF FOR PETITIONERS.

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W. LOWREY STONE,  
LOWREY S. STONE,  
Blakely, Georgia,  
JESSE G. BOWLES,  
Cuthbert, Georgia,  
FORREST L. CHAMPION, JR.,  
Post Office Box 1975,  
Columbus, Georgia 31902,  
Counsel for Petitioners.

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1963.**

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**No. 79.**

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**2,872.88 ACRES OF LAND, ETC., ET AL.,**  
**Petitioners,**

**versus .**

**UNITED STATES,**

**Respondent.**

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**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

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**REPLY BRIEF FOR PETITIONERS.**

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**1. INTEGRITY OF FEDERAL RULES OF CIVIL  
PROCEDURE IS AT STAKE IN THIS CASE.**

It ought not to have to be stated that the Federal Rules of Civil Procedure are applicable to all litigants, including the Respondent in this case, and to all intermediate appellate courts. These rules must not be decimated by a strained construction by a lower appellate court, or by the indifferent disregard of all authorities as is exhibited by the argument contained in the Brief for the United States in this case. We sub-

mit that the significance of the grant of certiorari is not in whether the judgment is affirmed or reversed, but instead lies in the eroding, if not disintegrating, effect which the opinion of the Fifth Circuit has upon the Federal Rules of Civil Procedure and their uniform interpretation and application. We submit that just such events led this Court in *U. S. v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, to state:

"Fact that triers of fact totally reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions.

"Federal rule providing that findings of fact shall not be set aside unless clearly erroneous applies to appeals by the government as well as to those by other litigants. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A.

"Where evidence would support a conclusion either way, but trial court has decided to weigh it more heavily for defendants, such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous'. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A."

*Id.* 177 (1) (2) (4).

In the opinion, it was stated:

"The Government suggests that the opinion of the trial court 'seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the Court.' We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts.

But we are unable to discover the slightest justification for the accusation that it did so 'uncritically.' Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it 'ignored' them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.

"Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said, 'We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the triers of fact. \* \* \* National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 659, 69 S. Ct. 1283, 1285.

"Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., provides among other things: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

*Id.* at 178, 179.

What was there stated might well have been written in response to the Respondent's argument in this case.

**2. RESPONDENT'S UNCONSCIONABLE REQUEST THAT NEW TRIALS BE GRANTED EMPHASIZES THE LACK OF EQUITY IN ITS POSITION THAT SPECIFIC OBJECTIONS TO PARTICULAR INADEQUACIES IN A MASTER'S REPORT ARE NOT REQUIRED UNDER RULE 53.**

Respondent seeks to intimate that the Commissioners might not still be available. Such is unworthy of consideration. The facts are that they are available as of this writing, and this information is known or readily available to Respondent.

Respondents' criticism of the Commissioners' memory is as unfounded as its criticism of their reports. The fact is that a transcript of the entire evidence is available to the Commissioners if the case should be remanded. Respondent's position in this respect is more contrary to reason than the appellate court's opinion which it seeks to uphold. Respondent would set aside a solemn judgment on the erroneous supposition that the Commissioners' memory is faulty. It requests this result at the hands of this Court when it utterly failed to pinpoint any specific inadequacy in the reports when it had the opportunity and at the time when it was required so to do under Rule 53 on appeal to the District Judge. There will never be an end to litigation before a Master if a party may wait until after it has taken its chance on the trial court adopting or rejecting an award before it seeks to point out particular inadequacies in a Master's report. We repeat, if Respondent's position and the decision of the Fifth Circuit is correct, then Rule 53, for all practical purposes, has been effectually destroyed by indirection.

**3. RESPONDENT'S ADMISSION THAT IT CANNOT PINPOINT ERROR IN THE COMMISSIONER'S REPORT IS CLEAR ADMISSION THAT THE DECISION OF THE FIFTH CIRCUIT IS WRONG.**

Respondent says on page 11 of its brief that "it is impossible to pinpoint the error in the commission's award" since the report did not state on whose testimony the Commission relied. The argument then asks this Court to suppose that the Commission gave credence to lay witnesses because the awards exceeded the testimony of the landowner's experts.

On page 10 of its Brief, Respondent states that the Commission rendered an award of approximately \$94.00 per acre for the Lindsey tract. This obviously is erroneous. The fee acreage taken was 963 acres and the award for this land was \$96,300.00. (R. 32, 39.)

The admission by Respondent that it cannot pinpoint an error is an admission that the decision of the Fifth Circuit is wrong. Heretofore, in order to show reversible error, it was necessary to show not a mere supposition, suspicion, or possibility of error, but a clearly erroneous ruling that substantially prejudiced the appellant's legal rights. This was not done in the instant case.

(a) **FACTFINDER IS NOT BOUND BY VALUE EXPERTS.**

That the awards in the instant cases exceeded the opinion of testimony of the landowners' so-called experts, to use this Court's language, impeaches neither their impartiality nor their propriety. A factfinder is not bound to follow the expert, nor any other opinion, for that matter, and opinion evidence is not evidence of fact.

"Opinions of experts as to value of gas leases are, at most, of evidential value and not of such conclusive force that refusal to follow them constitutes error, whether such evidence is addressed to a jury, judge, or statutory board."

*Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620 (6), 64 S. Ct. 724, at 729 and authorities there cited.

To same effect:

*Phillips v. U. S.* (2nd Cir., 1945) 148 F. 2d 714.

(4) (6) (11);

*United States v. Honolulu Foundation* (9th Cir., 1950) 182 F. 2d 172 (9) (10);

*Stephens v. U. S.* (5th Cir., 1956) 235 F. 2d 467, 468;

*Anderson v. Anderson*, 27 Ga. App. 513, 514, 108 SE 907;

*Welch v. Tennessee Valley Authority* (6th Cir., 1939) 108 F. 2d 95, 101;

*Wooley v. Great A & P Tea Co.* (3rd Cir., 1960) 281 F. 2d 78 (3).

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"The comparative value of opinion evidence and non-expert witnesses is for the jury."

*Fisher Motor Car Co. v. Seymour & Allen*, 9 Ga. App. 465 (3) 71 SE 764.

"On hearing objections or exceptions to the report of commissioners or viewers, the report is not only viewed with as much favor as the verdict of a jury, that is, it is sustained until it is shown to be wrong in a point of law or a matter of fact, but is regarded with even greater respect. It is entitled to great weight with the trial court especially on mere questions of value."

29 C.J.S., p. 1352, § 317 (a).

It is noteworthy that the trial judge instructed the Commission that it was not bound by the opinion of any witness, to which instruction Respondent made no exception (R. 24).

4. **RULES 52 AND 53 CONTEMPLATE THAT THE COURT OF APPEALS REVIEWS THE DISTRICT JUDGE, NOT THE COMMISSION. THE DECISION OF THE FIFTH CIRCUIT IGNORES THIS PRINCIPLE AND ATTEMPTS TO ENGAGE IN FACT-FINDING DE NOVO.**

On pages 9-10, Respondent argues that only by knowing how the Commissioners resolved conflicts in the evidence can a Court of Appeals meaningfully examine the awards and determine whether they were clearly erroneous. It then argues in footnote 2 of page 10 that it agrees with Judge Tuttle's dissent in *U. S. v. Twin City Power Co. of Georgia*, 253 F. 2d 197, 205, to the

effect that the Court of Appeals reviews the Commission's award itself and not the action of the District Judge in adopting or rejecting the award. This dissent essentially emanates from the mistaken concept that the Court of Appeals can disregard what the District Court did, and determine for itself de novo whether the Commission's findings were clearly erroneous. In that case the District Judge had rejected the Commission's findings. In the instant case the District Judge has adopted the awards. The dissent in that case, and the opinion in the present case, though in words recognizing the true rule of review, actually disregards the action of the District Judge, and would assume the role of the District Judge anew in reviewing the case. The opinion of the Fifth Circuit is an attempt to engage in factfinding de novo. This is plainly contrary to the express language of Rules 52 and 53.

Rule 53 contemplates the Master as an arm of the District Court. Only "if required" by the order of reference is it mandatory that the Master make findings of fact and conclusions of law. Only if the order of reference articulates the particular subjects on which findings are to be made can it be reasonably argued that the Master is required to make findings on specific facts. The order of reference in the instant case does not do so. There were no exceptions to the order of reference nor the instructions to the Commission. (R. 21.) Rule 53 (e) (2) then provides that the District Court after hearing may adopt the report, or modify it, or reject it in whole or in part, or receive further evidence, or recommit the case with instruc-

tions. This constitutes the first review of the case, because Rule 53 requires the Court to accept the Master's findings unless clearly erroneous. Rule 52 (a) then states that the Master's findings "to the extent that the Court adopts them, shall be considered as the findings of the Court". The adequacy of the findings for purposes of this review is "for the trial court to determine in the first instance in the light of the circumstances of the particular case". *Kelley v. Everglades Drainage District*, 319 U.S. 415, 422, 63 S. Ct. 1141, 1145. Only if the trial judge has abused his discretion in this respect are cases to be remanded for additional findings of fact.

The rules clearly contemplate a review of the action of the District Judge and not the Commission's awards because it expressly provides that the Master's findings, if adopted, shall become the findings of the District Court. This is the plain import of the Rules and the basis of the holdings in *U. S. v. Twin City Power Company*, (4th Cir., 1957) 257 F. 2d 108 (2), *U. S. v. Twin City Power Company*, (5th Cir., 1958) 253 F. 2d 197 (4), *Parks v. U. S.*, (5th Cir., 1961) 293 F. 2d 482 (2), *U. S. v. Tampa Bay Gardens Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598 (3) and *U. S. v. Cumberland County*, (4th Cir., 1961) 296 F. 2d 264 (6).

The patently erroneous decision of the Fifth Circuit stems from a holding that trial judge abused his discretion in adopting the awards without saying so, and without a finding of plain mistake on the part of the Commissioners or the Court, as required by law before a case is reversed.

**5. OPINION OF THE FIFTH CIRCUIT CASTS UN-AUTHORIZED REFLECTION UPON QUALIFICATIONS OF WITNESSES FOR PETITIONERS, AND WEIGHT OF THEIR TESTIMONY.**

Rule 43 states that "the statute or rule which favors the reception of the evidence governs". In this regard, the matter of qualifications of a witness is peculiarly for the trial judge, in this case, the Master. Since Rule 43 provides that the rule which favors the reception of evidence governs, Petitioners cite below the applicable Georgia law relating to opinion evidence of value and qualifications of witnesses.

"Market value, how proved.—Direct testimony as to market value is in the nature of opinion evidence. One need not be an expert or dealer in the article, but may testify as to value, if he has had an opportunity for forming a correct opinion. (86 Ga. 693 (12 S.E. 1017).)"

*Georgia Code, 1933, § 38-1709.*

"Primarily, the question of the competency of a witness to testify is a preliminary one for the trial court.

"A witness is competent to testify as to the market value of farm land, if he has had an opportunity for forming an opinion as to its value."

*Central Georgia Power Company v. Cornwell,*  
139 Ga. 1 (1), 76 SE 387.

In the body of the opinion, the Supreme Court of Georgia quoted Lawson on Expert and Opinion Evidence (2nd Ed. p. 469 et seq.) to the effect that farmers are experts as to the value of farm lands and its

products. It also adopts the rule that all specific limitations and tests as to qualifications are abandoned, and the broad test adopted that "any person having knowledge of" or "acquainted with" the values may testify. The Court states that this broad rule is "perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge, . . . whose decision will not usually be disturbed on appeal. . . . A claim to knowledge will reasonably be regarded as prima facie sufficient . . . . Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question."

*A fortiori*, an owner is presumed to have sufficient knowledge of his property and its value to express an opinion. See *Warren v. State*, 76 Ga. App. 243, 245, 45 SE 726.

The Georgia rule is substantially in accord with the Federal Rule as announced by this Court in *Montana Railway Co. v. Warren*, (1890) 137 U.S. 348, 11 S. Ct. 96, and in the following additional authorities.

"Generally an owner familiar with property which he occupies and operates in a business may testify concerning its value when that issue becomes material, even though he may not be an expert as to values generally of property of that kind."

• *Telluride Power Co. v. Williams*, 164 F. 2d 685 (5), 10th Cir., 1947.

"An owner is competent to testify as to value of his property.

"Since an owner is competent to testify as to the value of his property, *Chase v. MacDonell*, 154 Okl. 165, 7 P. 2d 465; the jury was at liberty to consider the owner's valuation as well as that of the expert."

*Hartford Fire Insurance Company v. J. W. Cagle*, (10th Cir., 1957) 249 F. 2d 241 (8), 243.

That the witnesses were qualified is sustained by authorities which Respondent makes no attempt to distinguish. Respondent conceded this when it made no objection to their testimony, no motion to strike same, and no objection as to their qualifications in the so-called general objections to the awards. The question simply was not before the Fifth Circuit, but the opinion of that Court labors to sustain its reversal of the Trial Court by resort to unjustified criticism of the qualification of Petitioners' witnesses, and the weight of their testimony. Again, it is a case of fact-finding, pure and simple, on an appellate level.

"Neither federal District Court, nor Court of Appeals on appeal, may refuse to recognize master's findings merely because of a difference in personal persuasion or a dissatisfaction with result reached. Fed. Rules Civ. Proc. rule 53 (e) (2), 28 U.S.C.A."

*Ferroline Corp. v. General Aniline & Film Corp.*, 207 F. 2d 912 (10) 913 (7th Cir., 1953).

**6. COMMISSION WAS NOT REQUIRED IN WATSON CASE TO MAKE FINDINGS AS TO WITNESSES' OPINIONS AS TO THE CONTRIBUTION OF IMPROVEMENTS TO MARKET VALUE OF LAND AS A WHOLE. NEITHER WAS IT REQUIRED TO MAKE SEPARATE FINDINGS OF THE VALUE OF THE SEPARATE TRACTS OF LAND IN THE GAVIN CASE.**

If Respondent is correct, a Commission must make explicit findings as to qualifications of witnesses, and who they believed and why they believed one witness in preference to others. But the requirement of findings does not stop here. If a witness gives the basis of his opinion, then a Commission must go further, and explicitly state what it finds with reference to such breakdown or cross examination of the witness. We are unaware of any authority which holds such, and cannot conceive that the requirement of findings has reduced Rule 53 (e) (1) (2) to such an absurdity.

At the outset, it is recalled that there were no objections to this testimony by Respondent in either of the cases.

Since the breakdown of improvements in the Watson case, and the separate valuation of the tracts in the Gavin property are in principle somewhat related, these points will be argued together.

We daresay that the Commissioners made separate determinations of the amounts which the improvements contributed to market value in the Watson case, and

separate determinations of the separate tracts in the *Gavin* case, Respondent would probably have complained of a violation of the so-called "unit" rule. See *U. S. v. City of N. Y.*, (2nd Cir., 1948) 165 F. 2d 526, where a "raw land" approach to value was condemned. However, in this case, Judge Hand observed as to the so-called unit rule as follows:

"Indeed, we think that it is an undue simplification to extract from the books any 'Unit Rule' whatever, in the sense of general authoritative directions. The argument, so put, is undoubtedly a highly important caution, when the attempt is made to appraise improved land by a process of cumulation; but we question whether it has any further office than to keep before the tribunal the only relevant objective: The exchange value of the newly emerged unit."

*Id.* at 528.

Likewise, admission of evidence as to separate tracts of the land condemned is clearly a proper approach to valuation of the whole. Judge Hand continued:

"It is true, when an area has been subdivided into plots that the very fact that these have been made separately saleable, will ordinarily make it desirable to appraise the whole by separate valuations of each plot;"

*Id.* at 52.

To same effect, *Cade v. U. S.* (4th Cir., 1954) where it was held:

"It was error for trial judge, in condemnation proceeding, to strike out entire testimony of ex-

pert witness, who testified to value of land as whole after giving valuation which he had placed upon various parts, on ground that overall value to which witness had testified had been arrived at by adding together values he had placed upon various items.

"Property should be valued as a whole for purpose of assessing compensation for the taking, but this does not preclude admission of testimony showing particular elements of value for consideration by jury in arriving at overall value which they are required to find as basis of compensation, and value of a rock deposit, like value of coal mine or an oil well or a building, may properly be shown as bearing upon value of property being taken, even though measure of recovery is overall value of property."

*Cade v. United States*, (4th Cir., 1954) 213 F. 2d 138 (4) (7), 139.

In *Cunningham v. U. S.*, 270 F. 2d 545, the identical complaint of no findings as to the value of subtracts was made, and the Fourth Circuit disposed of such contention in the following language:

"The failure of the commissioners to find a value for each of the subtracts of tract 12 is the first ground of attack under the report. It may be that, under the circumstances of this case, we would not find fault with a report which separately valued each use area and found just compensation to be the sum of separate values. See *United States v. City of New York*, 2 Cir., 165 F. 2d 526, 1 A.L.R.2d 870. In the earlier appeal, however, we admonished the commissioners:

" \* \* \* This testimony (of values of portions of the land for special purposes) was admissible as bearing on the question of valuation, even though it was required that the property be valued as a whole. *Cade v. United States*, 4 Cir., 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements of value together. *Morton Butler Timber Co. v. United States*, 6 Cir., 91 F. 2d 884; *United States v. Certain Parcels of Land*, 5 Cir., 149 F. 2d 81. \* \* \* (246 F. 2d 333.)

"It is true we were then thinking, in part, of testimony that the land contained ilmenite and had a value for mining purposes, a use inconsistent with other claimed uses. We can hardly say the commissioners failed to follow our instructions, however, when they did what they were told to do by this Court and by the District Court. In re-submitting the case, the District Court instructed the commissioners to find a single value for tract 12 as a whole.

"No one requested the courts to instruct the commissioners to find separate values for the sub-tracts until the landowners did so after the completed report had been considered by the District Court. No one requested the commissioners to find such values. Furthermore, the absence of separate valuations is no undue hindrance to judicial review, for, as will presently appear, the reason for the differences between the findings of the commissioners and those of the District Judge is clear."

*Cunningham v. United States*, 270 F. 2d 545, 548 (4th Cir., 1959).

At any rate, the Commissioners did not fall into this "trap". Separate valuations of improvements and of subtracts were neither required nor requested. Even the Fifth Circuit's opinion does not complain of these as a deficiency in findings of fact.

Findings are not required to every facet of the evidence, nor need they discuss rejected propositions or contentions of the parties. Cases from every Circuit in this Country (collected and cited pp. 14-23, Petitioners' petition for certiorari) and this Court's decision in *Interstate Circuit, Inc. v. U. S.*, 304 U.S. 55, affirm this basic rule of law. See 5 Mopre's Federal Practice, pp. 2660-61.

**7. FINDINGS WITH REFERENCE TO ALLEGEDLY COMPARABLE SALES EVIDENCE ARE NOT REQUIRED UNDER RULES 52 OR 53.**

On page 16 of its brief, it is asserted by Respondent that "it is only in the absence of such sales (truly comparable sales) . . . that opinion evidence should be given weight in determining just compensation". Respondent cites no case to support this statement of principle and we submit there are none. Generally, truly comparable sales are the best evidence of value. Candor requires recognition, however, that no two parcels of land are alike. Whether a particular sale offers sufficient similarity to the tract being valued, whether it is sufficiently proximate in time and under similar market conditions, and whether it was a free and voluntary sale, aside from other factors, make such

evidence no inflexible formula for the determination of market value, but renders it merely evidence to be weighed and adjusted by the factfinder, in much the same fashion that it weighs opinion and other evidence. The presumption is that the factfinder applied proper rules of law in weighing all the evidence.

**(a) RESPONDENT REFUSES TO FACE THE VITAL DISTINCTION BETWEEN SIMILAR SALES INTRODUCED AS INDEPENDENT OR SUBSTANTIVE EVIDENCE OR AS THE STANDARD OF VALUE, AND SALES INTRODUCED AS A BASIS FOR THE OPINION OF ITS EXPERT WITNESSES.**

It is obvious from the reading that the Commission rejected the opinion evidence of the Respondent's witnesses and the claimed comparable sales which were used to attempt to buttress these opinions. The distinction between the two methods of use of comparable sales evidence has been recognized as vital.

"In condemnation cases evidence of sales of other properties is admissible for either one or both of two purposes: (1) to establish an actual going market for sales of like property which then becomes the best (if not the only) measure of just compensation; (2) as tangible evidence of one of the many factors leading a skilled expert to reach a conclusion on value where there is no going market. The distinction is vital as this Court has pointed out. When the effort is not to show the sale of other property \* \* \* as a standard of value, but these are referred to by a witness experienced in dealing with such properties in the neighborhood and qualified to have an opinion on values,

merely, as things in his knowledge which contributed to the opinion which as an experienced man he holds, his opinion ought not to be rejected from evidence, but ought to go to the jury for their consideration if its reliability \* \* \*, *Atlantic Coast Line R. R. v. United States*, 5 Cir., 1943, 132 F. 2d 959, 963. As we more recently stated in approving this case, the 'experts must base their opinions on such information in the art that accounts for their becoming experts.' And, not surprisingly, that means that even 'a certain amount of hearsay is a necessary ingredient of the opinion \* \* \*', *International Paper Co. v. United States*, 5 Cir., 1955, 227 F. 2d 201, 208."

*Dissenting Opinion of Judge Brown in U. S. v. Michoud Industrial Facilities*, (5th Cir. 1963) 322 F. 2d 698, 719.

To same effect:

- *Atlantic Coast Line R. R. v. U. S.*, (5th Cir., 1943) 132 F. 2d 959, 963;
- *U. S. v. Johnson*, (9th Cir., 1960) 285 F. 2d 35 (5) (6) (7), at 40-41;
- *U. S. v. 5139.5 Acres of Land* (4th Cir., 1952) 200 F. 2d 659, 662.

Where the value opinion themselves were rejected, it is reasonable to conclude that the allegedly comparable sales testified to by these experts were likewise rejected.

"Findings of the trial court 'are to be construed liberally in support of a judgment or order. . . . Whenever, from facts found, other facts may be

inferred which will support the judgment, such inferences will be deemed to have been drawn."

5 Moore's Federal Practice, ¶ 2661.

Respondent can hardly complain of the failure to make detailed evidentiary findings as to the one comparable sale introduced in the *Lindsay* case, and the five comparable sales introduced in the *Gavin* case, particularly where it made no request for such findings or objections to the reports articulating this as an objection. Petitioners might have made this a basis for an objection but it is Petitioners' position that a specific objection calling for such a finding would be meritorious.

On page 17 of its Brief, Respondent incorrectly states that the *Lindsay* award exceeded by \$53,990.00 the sole opinion based on comparable sales. This ignores the fact that Landowners' expert based his opinion on comparable sales, as did several of his other witnesses. It is presumptuous for Respondent to even use the term "comparable sales" in connection with Mr. Hall's testimony since the Commission obviously rejected his testimony and the purportedly comparable sales on which his opinion was based.

**8. COMMISSION NOT REQUIRED TO STATE WHAT WITNESS IT RELIED UPON IN FIXING MARKET VALUE OR SEVERANCE DAMAGE.**

On pages 14-15 of its Brief, Respondent summarizes the evidence as to severance damage to the *Gavin* tract. The Commission awarded \$4,480.00. Landowners' expert testified to total severance damage of

\$4,586.00, and gave his basis therefor. On page 20 of its Brief, Respondent states that the Rules do not require Masters to set out "evidentiary factfindings in infinitesimal detail". Respondent's complaint of not making specific findings as to each phase of the evidence as to severance damage of the Gavin tract is entirely inconsistent with its admission that Masters are not required to make evidentiary factfindings in minute detail.

**9. THE TEST AS TO ADEQUACY OF FINDINGS IS WHETHER THEY ARE SUFFICIENTLY COMPREHENSIVE AND PERTINENT TO THE ISSUES IN THE CASE TO FORM A BASIS FOR DECISION, AND WHETHER THEY ARE CLEARLY ERRONEOUS, AND THIS IS FOR THE TRIAL COURT TO DETERMINE IN THE FIRST INSTANCE.**

Glossing over the innumerable decisions to the effect stated urged by Petitioners and indifferently ignoring the numerous authorities supporting Petitioners' position, Respondent again assumes the role of a favored litigant and announces a new rule to suit its reasoning as follows:

"The guideline as to the adequacy of findings is whether they provide a sufficiently informative explanation of the premises upon which the commission acted and the inferences it drew to enable the reviewing court to conduct an intelligent examination of the validity of the commission's conclusions."

We have found no decision supporting this loose language and we submit there are none.

The classic statement of the test has been:

"The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence."

*Schilling et al. v. Schwitzer-Cummins Co.*, 142 F. 2d 82, 84 (CCA D.C., 1944).

On page 15 of its Brief, Respondent asserts that the District Court was not given "the slightest clue as to why the Commissioners selected the figures they did instead of others for which there was supporting evidence". The District Court did not find himself so uninformed. Why does any factfinder find a verdict different from other figures within the range of competent evidence? It is simply a matter of credibility, and Respondent's argument closes its eyes to that part of Rule 52 which states "and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses".

Next, it is asserted by Respondent on page 21 of its brief that "Petitioners labor under the misapprehension that a condemnation commission is merely a group of three masters". This accusation is not supported by fact, logic or law. The import of Rules 71A (h), 53 and 52 are clear for the reading. Rule 71A (h) constitutes the Commission a master or factfinder

under Rule 53 to determine just compensation. All other issues are for the District Court. There is nothing unique in Rule 71A (h) as contended by Respondent.

**10. HATAHLEY v. U. S., 351 U.S. 173, AND DALEHITE v. U. S., 346 U.S. 15, SUPPORT NEITHER THE DECISION OF THE FIFTH CIRCUIT NOR RESPONDENT'S ARGUMENT.**

The *Kelley* case, *supra*, has already been distinguished (Petitioners' Brief, pp. 26-27).

The *Hatahley* case distinguishes itself.

"But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed. Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among the Petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard." (Emphasis ours.)

*Hatahley v. United States*, (1956) 76 S. Ct. 745, 752, 351 U.S. 181.

Respondent finds no support for its position in *Dalehite*. In that case, this Court merely held that as a matter of law no cause of action lay under the Federal Tort Claims Act, and the so-called findings of fact of negligence were held not binding as determinative of the case, because they were in fact conclusions of law without legal basis. Judge Hutcheson's opinion in the case below, 197 F. 2d 771, at 782, characterized the findings as "profuse, prolific and sweeping". Judge Rives' opinion at 774 quotes the District Court as stating:

"Counsel for Plaintiffs and Defendant have, at the Court's request, indicated what Findings of Fact they think should be made, but many of such requests for Findings are for Findings on evidence as distinguished from Findings on the issues as made by the pleadings. Such requests are hereinafter disposed of. An effort has been made to find the facts only on the issues, and thus bring the case within as small compass as possible." (Emphasis ours.)

*Texas City Disaster Litigation*, (5th Cir., 1952)  
197 F. 2d 771, 774.

The point is that the findings were "profuse, prolific and sweeping" rather than "of fact" and "concise". Respondent is here complaining not of profuseness, but of claimed inadequacies or over-conciseness. It would indeed be findings on evidence instead of fact on the issues if Respondent's position is accepted.

**11. RESPONDENT CONCEDES THAT RULE 53 (e) (2) REQUIRES OBJECTIONS IN ORDER TO PRESERVE MATTERS FOR REVIEW.**

On pages 21 et seq., Respondent contends that it could make only general objections to the Commission's report in the District Court. Respondent's failure to file specific objections articulating particular inadequacies in the reports suggests that its present contentions are afterthoughts after it took its chances on an appeal and lost. Nothing, absolutely nothing, prevented Respondent from filing specific objections complaining that the reports were inadequate because:

(a) The reports fail to set forth the qualifications of the witnesses; or

(b) The reports fail to state what witnesses and what evidence the Commission credited and discredited, and ultimately relied on in arriving at its award; or

(c) The reports fail to state whether the allegedly comparable sales introduced into evidence were in fact truly comparable so as to be a guide in the determination of fair market value; or

(d) The reports fail to state why the Commissioners agreed upon the sums awarded rather than other sums within the range of the evidence; or

(e) The reports fail to set forth the method by which the Commission arrived at the awards agreed upon; or

(f) The reports failed to state why they discredited the Respondent's expert witnesses.

Respondent did file such specific objections in *Gill v. U. S.*, (9th Cir., 1962) 313 F. 2d 416, and *U. S. v. Tulare Co.*, 187 F. Supp. 728, but such specific objections are significant by their absence in the instant cases.

The suggestion that *U. S. v. Lewis*, (9th Cir., 1962) 308 F. 2d 453 (2), at 456 is an "intimation to the contrary" of Respondent's position is playing with words. The Ninth Circuit in that case categorically rejected Respondent's present identical contentions in that case. See Petitioners' Brief, p. 38.

The argument advanced in this Section of Respondent's Brief not only misses the point of Petitioners' argument in the second section of their Brief, it has no appeal to reason, logic or authority and finds no support in the Rules. Finally, it is bottomed on a misunderstanding of the meaning of the word "merits". Merits is defined by the authorities to relate the matters of substance as distinguished from matters of form, practice, procedure or jurisdiction. Finally, it is inaccurate because exceptions as to the merits of the cases were made in the exceptions and objections filed in the District Court. See Exceptions numbered 3, 4, and 5, (R. 50-52, 52-54, 100-101). These objections to the merits were abandoned on appeal when Respondent specified its points. (R. 108-109.)

The position of Petitioners is plainly stated on page 39 of our Brief and we will not labor the point. How-

ever, it is indeed noteworthy that Respondent concedes that Rule 53 (e) (2) requires objections to be filed in order to preserve questions for review. (Respondent's Brief, p. 22.) Where Respondent's argument fails to come to grips with the real issue is whether these objections may be general or must be specific. A critic should point to the deficiency complained of and advise the Court specifically what he wants, and make known or articulate his grounds of objection. Otherwise, he is deemed to have waived the objection. Of course one must object for a specific purpose, and where there is no objection to the end result, complaints as to procedural matters present only academic questions.

"Where neither party to condemnation proceeding excepted to Commission's finding as to amount which would constitute just compensation, neither party could raise question concerning form of or contents of report."

*U. S. v. Land in Tulare Co.*, 187 F. Supp. 728 (11).

The extreme hypothetical case set forth on pages 22-23 of Respondent's Brief illustrates merely that the specific objection that no hearing was had as required by Rule 53 would be sufficient to set aside the award for non-compliance with the Rules and due process. Such an objection is specific, however, and points to a defect which obviously is ground to set aside the award.

**12. A PARTY MAY COMPLAIN OF PROCEDURAL ERRORS, BUT A FAILURE TO COMPLAIN OF PROCEDURAL ERRORS IS A WAIVER THEREOF.**

Petitioners agree that a party may complain of procedural errors that infect a judgment. The failure to complain is a waiver thereof. It is the failure to complain by filing specific objections to the Reports at the proper time that bars the Respondent in this case.

The accusation that Petitioners' contention that Respondent's failure to challenge the excessiveness of the awards in its designation of points on appeal rendered its vague and general objections ineffectual to present a question for review is patently frivolous seems misdirected. It was not frivolous to Judge Hall in *U. S. v. Tulare Co.*, *supra*, nor is it deserving of such a bit of namecalling here. Of course, a Court of Appeals has the inherent power of its own motion to reverse a judgment which is inherently wrong, a gross miscarriage of justice, or the product of prejudice or bias. But such power is reserved for such cases and is not exercised in such cases. See *Stephens v. U. S.*, (5th Cir.; 1956) 235 F. 2d 467 (2) 470-471. When a Court of Appeals uses this inherent power to reverse judgments which are not of the type contemplated, it abandons its judicial role, and commits error. That is what the Fifth Circuit did in this case. This is no frivolous matter, at least to Petitioners. Neither was the lax procedure followed by Respondent in these instant cases deemed a frivolous matter to Ninth Circuit Court of Appeals when it stated:

"Neither individually nor collectively do these incidents in the course of the trial furnish any basis for the charge of bias and prejudice leveled at the trial court for the first time on appeal. Apropos of the situation here is the statement of the Court in *Adams Dairy Co. v. St. Louis Dairy Co.*, (8th Cir.) 260 F. 2d 46, 55:

"The zeal with which counsel for appellant presents this contention on appeal contrasts sharply with their failure to demonstrate any concern at the time the challenged conduct was in progress. A painstaking and assiduous examination of the voluminous record reveals that not a single objection was made or exception taken to the conduct of the judge, said to be so prejudiced as to constitute denial of due process. Under Rule 46 of the Federal Rules of Civil Procedure, 28 U.S.C.A., a party is required to make known his objection and grounds thereof. Substance inheres in this requirement and observance thereof is essential to the administration of the business of the courts."

*United States v. Johnson*, (9th Cir., 1961) 285 F. 2d 35, 42, 43.

### CONCLUSION.

It is manifest from reading the opinion of the Fifth Circuit that it stems from the particular judges' concept of prior strictures against the use of a Commission in condemnation cases. (R. 114-115.) The undertones of the opinion exude almost a contempt for a Commission. It is claimed in the opinion of the Fifth Circuit that at a jury trial, the trial judge properly rules on the ad-

missibility of evidence and then narrows the issue by appropriate charges to the jury. There are numerous decisions to the effect that it is presumed that only proper evidence was considered by the Commission in arriving at its awards. Insofar as knowledge of the law is concerned, the reports reflect proper knowledge of the applicable law and the instructions to the Commission by the trial judge summarize the law governing the Commission. The trial judge made adequate provision for ruling on the admissibility of the testimony and stated that the Chairman of the Commission was an experienced attorney (R. 25). Under such circumstances, the claimed distinction between a jury and a Commission is one without a difference. The award of a Commission is generally treated the same as the verdict of a common law jury. See *U. S. v. Certain Lands in Jackson Co.*, 48 F. Supp. 591 (1) (2) (3) 592. To same effect: *U. S. v. Land in Wayne Co.*, 40 F. Supp. 792 (2); *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 30 S. Ct. 581, 586; *Shoemaker v. U. S.*, 147 U.S. 282, 13 S. Ct. 361; *St. Bernard Cypress Co. v. U. S.*, (5th Cir.) 65 F. 2d 711; *Guste v. U. S.*, (5th Cir.) 55 F. 2d 115, 117; *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 30 S. Ct. 581, 586; *Shoemaker v. U. S.*, 147 U.S. 282, 13 S. Ct. 361; *St. Bernard Cypress County v. U. S.*, (5th Cir.) 65 F. 2d 711; *Guste v. U. S.*, (5th Cir.) 55 F. 2d 115, 117.

In the *Wayne County* case, *supra*, it was stated:

"These cases state the law. To what end should a Court undertake to weigh evidence, and to make a finding as to value. It cannot enter judgment based upon its independent finding but must re-

submit the matter to a Commission if it sets aside the award. Should this process continue until the Commission reaches a result that accords with the view of the Court? To do so would strip the Commission of their authority to determine the amount of compensation to be paid to the property owners in condemnation cases. It would vest the Court with authority not granted by the statute, and not consonant with our fundamental law.

"The function of the reviewing Court is to look for 'plain mistake whether of law or fact, or plain partiality or corruption.'" *Guste case, supra.*

*U. S. v. Wayne County, 40 Supp. 792.*

Whether a litigant, or a Court likes or dislikes the Rules of Civil Procedure is no reason for upsetting every award of a Commission that comes before that Court. If Respondent had taken exception to the trial court's reference to the cases to a Commission and the Fifth Circuit had held that it abused its discretion in this respect, Petitioners would have no cause for complaint. The law would have run its course, and the integrity of the Rules maintained. Not so in the instant case. Such collateral attacks upon the integrity of awards as the opinion of the Fifth Circuit typifies we pray will not be sanctioned by this Honorable Court.

Respectfully submitted,

W. LOWREY STONE,  
LOWREY S. STONE,  
JESSE G. BOWLES,  
FORREST L. CHAMPION, JR.,  
Attorneys for Petitioners.

### CERTIFICATE OF SERVICE.

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1963, I served copies of the foregoing Reply Brief for the Petitioners to the United States Supreme Court on the United States of America, Respondent, as follows:

By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,  
Assistant Attorney General,  
Washington, D. C.,

Messrs. Roger P. Marquis and Hugh Nugent,  
Attorneys, Department of Justice,  
Washington, D. C.,

Mr. Floyd M. Burford,  
United States Attorney,  
Macon, Georgia

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

FORREST L. CHAMPION, JR.,  
Attorney for Petitioners,  
Post Office Box 1975,  
Columbus, Georgia 31902.

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SUPREME COURT, U. S.

**Supreme Court of the United States**

**OCTOBER TERM, 1963.**

Office-Supreme Court, U.S.

**FILED**

**MAR 19 1964**

**JOHN F. DAVIS, CLERK**

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**No. 79**

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**2872.88 ACRES OF LAND, ETC., ET AL.,**  
**Petitioners,**

**versus**

**UNITED STATES,**

**Respondent.**

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**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

---

**PETITION FOR REHEARING.**

---

**W. LOWREY STONE,**  
**LOWREY S. STONE,**  
**JESSE G. BOWLES,**  
**FORREST L. CHAMPION, JR.,**  
**Attorneys for Petitioners.**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1963.**

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**No. 79.**

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**2872.88 ACRES OF LAND, ETC., ET AL.,**  
**Petitioners,**

**versus**

**UNITED STATES,**  
**Respondent.**

---

**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

---

**PETITION FOR REHEARING.**

Petitioners present its petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

**GROUND'S FOR REHEARING.**

- A. The Opinion Of This Court Fails To Apply Recognized Principle Of Law To The Facts Of The Case, Which, If Applied, Requires A Different Decision From That Rendered.**

Petitioners file this Motion for Rehearing reluctantly, and do so only because they humbly but firmly believe

that this Court overlooked applying the recognized requirement of specificity of objections to a master's report in order to preserve a question for review.

The opinion reads:

"Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific, rather than in generalized form, as required by equity practice. See *Sheffield & Birmingham R. Co. v. Gordon*, 151 U.S. 285, 290, 291."

To same effect: *U.S. v. Lewis* (9th Cir. 1962) 308F<sup>2</sup> 453, at 456.

The opinion is silent as to application of this requirement of specific objections to the instructions to the commission, or to commission's reports. The failure to apply this recognized principle lies at the root of the error of the decision of this Court.

To specify is literally to lay the finger upon the point. Petitioners respectfully suggest that the objections in Case 79 to the reports are not of the required specificity. The opinion does not so hold. If they were of the required specific nature, it should be so held. If they are not of the required specificity, then it follows that the trial judge cannot be put in error for overruling them. Particularly is this conclusion demanded where Respondent did not contend that the awards were excessive in its points upon which it relied on appeal. The decision overlooks the lack

of specific objections by Respondent and then requires the most exacting instructions by a trial judge, and a fully detailed report, all without specific objections by the appealing party.

Likewise, it is respectfully suggested that if this Court does not see fit to grant this rehearing applied for, then it should specify precisely what "more" in 1-2-3 fashion the District Court should have done, or what additional findings it or the Commission should now make in order to constitute compliance with this Court's decision.

**B. Instructions Given In Case 79 Substantially Complied With The Guidelines Stated In This Court's Opinion.**

As to Case 79 there were no objections to the instructions by the Trial Court to the Commissions. The opinion recognizes the adequacy of these instructions as to the law. Page 5 of the opinion. The Trial Court instructed the Commission as to the comparative weight of "expert" opinion and other opinion evidence (R. 24), as to both opinion evidence and comparable sales being competent evidence of value (R. 24), and as to the best evidence of value by necessary implication. It defined "just compensation" as "fair market value" and then defined fair market value as the price which a willing purchaser would pay a willing seller as of the date of taking, (R. 22-23) which could mean only that truly comparable sales prior to or after but not remote from the date of taking (R. 24) is the best evidence of value. The Trial Court did not give ex-

amples of severance damage, but he defined it in simple terms that no reasonably intelligent layman or lawyer could misunderstand. (R. 22.) *It is hardly necessary to illustrate that which is readily understandable.* The Trial Court instructed the Commission as to the manner of conducting the hearing. (R. 19, 22, 25.) It also instructed the Commission as to the view of the property and the limited purpose of it. (R. 25.) It did not instruct the jury as to the kind of evidence inadmissible nor the manner of ruling on it. It contemplated that the chairman of the Commission, "an experienced attorney" would rule upon the admissibility of evidence. (R. 25.) It would be virtually impossible for a trial judge to anticipate the evidence that would be introduced by the parties, and instruct the Commission specifically on how to rule on such evidence. The further instruction that if some unanticipated problem should arise the Commission should ask the Court for additional instructions (R. 26) left the Commission free to consult with the Court as to any unusual problem or question which might arise.

The cases were tried in the United States Court Room. (R. 32, 41, 89.) Pretrials were had. (R. 29.) The views of the lands were made with representatives of both parties present. A complete transcript of the proceedings was before the trial court. The cases were tried by the same rules and in accord with the same decorum and requirements of due process, objections to evidence and rulings thereon and the trials were the equivalent of any trial before the trial judge himself. Counsel for Petitioners know this to be a

fact from personal experience. There is not the slightest suggestion to the contrary in the record.

In view of the above, Petitioners respectfully submit that the awards should not be set aside for any inadequacy in the instructions, particularly since no exceptions were taken thereto. The analogy of Rule 51 compels this conclusion.

**C. Opinion Is Inconsistent Within Itself As To Interpretation Of Rules 52 And 53.**

The Trial Court instructed the Commission to file a written report setting forth the findings of fact and conclusions of law and the amount of just compensation. (R. 26.) Rule 53 only requires a report if required by the order of reference. A "conclusory finding" would have been only a statement of the amount of just compensation awarded. To label the findings of fact in the instant cases as conclusory findings overlooks the findings of (1) highest and best use, (2) the value of lands taken in fee, (3) value of flowage easements and (4) severance damage.

The Court's opinion states that the instructions as to the report in the instant case are inadequate because the Commission was not expressly directed to state (1) the reasoning or the process they used in deciding an award, (2) what standard they try to follow, (3) which line of testimony they adopt, (4) what measure of severance damages they use and (5) and so on. Opinion, Pages 6-7.

*Reasoning upon evidence is not fact finding. Interstate Circuit, Inc. v. United States, 304 U.S. 55; Petter-son Lighterage & Towing Corp. v. New York Central R. Co. (2nd, 1942) 126 F<sup>2</sup> 992, Lange v. Liberty National Insurance Company, (9th Cir. 1963) 324 F<sup>2</sup> 237 (2), at 241.*

Even without such instructions the Commission stated the standard they applied, namely, fair market value complying with (2) above. As to (3), they did not expressly state what line of testimony they adopted, but it is obvious that they rejected the Respondent's line, and formulated their own independent findings after considering all of the evidence, which more nearly approximated the landowner's line. As to (4) they did not state expressly what measure of severance damage they used, but they did state the basis therefor. (R. 28, at approximately \$31.00 per acre for 502 acres, R. 48, at approximately \$50.00 per acre for 70 acres, and R. 97, at approximately \$22.40 per acre for approximately 200 acres.) The measure of severance damage is exactly what the name implies and what the trial judge instructed the Commission, and could only be the difference in the fair market value before and after the taking. As to "and so on" Petitioners suggest that this connotes nothing specific.

The really new innovation which the opinion introduces into Rule 53 is the requirement of the statement of the process by which the Commission reached the award, or the path which the Commission chose to follow through the maze of conflicting evidence.

This in essence calls for reasoning upon the evidence which is not required under Rule 52 by a judge trying a nonjury case. Yet the opinion states that the Commissioners "need not make the detailed findings such as judges do who try a case without a jury". Opinion, Page 6. The inconsistency in the opinion is patent. First, the opinion states that a master need not make detailed findings as a judge is required to do, and then, in the same paragraph, nevertheless concludes that a master must state the process of decision or the reasoning upon the evidence, *which a judge is not required to do under Rule 52*. This requirement of the statement of the process of decision is essentially a statement of the process of what evidence was credited and discredited. With the introduction of this new interpretation of Rule 53, Petitioners respectfully suggest that the opinion, if literally applied, as the lower courts must apply it, has laid to rest both Rules 53 and 71 A(h), insofar as practical use. We fearfully predict that the opinion may well become the beginning of the practical demise of these rules. The most skillful trial judge will find it exceedingly difficult to instruct a commission adequately, and no commission will be able to comply with the detail required. We respectfully suggest that there are no words in Rules 52 and 53 which call for such a difference in findings. Indeed, Rule 52, in stating that the findings of a master, to the extent that the Court adopts them shall be considered the findings of the Court", necessarily contemplates identical requirements as to factfinding.

The opinion states that it writes upon a clean slate. Only if the Court overlooks its prior holdings in the

cases of *Kelley v. Everglades Drainage District*, 319 U.S. 45 holding that the nature and sufficiency of findings are for the trial judge to determine in the first instance, and the case of *Interstate Circuit, Inc. vs. U.S.*, 304 U.S. 55 holding that reasoning upon the evidence is not fact-finding under Rule 52, and by holding that findings of fact under Rule 52 means one thing and still another under Rule 53 is there a clean slate to write upon.

**D. Opinion Cites U. S. vs. Lewis, 308 F<sup>2</sup> 453; At 458 and 456, Approvingly (Pages 6 and 7 Of Opinion) But Lewis Case Decision Is Basically Contrary To This Court's Opinion.**

The Lewis Case, Page 458, dealt with a conflict in evidence as to highest and best use (whether for ranching or gravel deposit) and the Court held that it "must know what the highest and best use of the property is and whether and how the gravel deposit figured in the values found." *Id.*, Page 358. The objections to the report in that case protested the "use value approach" rather than "fair market value". The reports in the instant cases, expressly recited the fair market value was the standard used by the Commissioners and in addition there was no conflict in the evidence as to highest and best use as there appeared in the Lewis case and the case of *U. S. v. Carroll*, (4th Cir. 1962), 304 F<sup>2</sup> 300 (horse farm vs. marketable sod).

Again the opinion of this Court refers to Page 456 as sustaining the requirement that the process by which the Commissioners reached their award be

stated explicitly. There is no language on this page of the *Lewis* opinion which supports this position. As against a contention that no findings of fact are required by Rule 53 and 71 A-h, the Court in the *Lewis* Case disagreed and held:

"There must at least be resolution of factual disputes as to the character of the property, its highest and best use and the elements which contribute to its value; and disputes as to applicable principles of valuation." *Id.*, p. 456.

Petitioners note in passing that the *Lewis* decision (p. 456) recognizes and applies the requirement of specific objections to a report as of controlling significance, even as the opinion of this Court recognizes on Page 7 of the opinion, citing the *Sheffield* case, *supra*, as authority, but fails to apply it to the facts of the cases *sub judice*.

Petitioners respectfully suggest that this Court must have overlooked the language of the *Lewis* case, (*Bening* and *Morrison* Cases) *supra*, at Page 460, which reads as follows:

"(7) The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose *what* proof the commission relied on and *why* the commission chose to believe certain witnesses and accept certain evidence as more credible than other witnesses and other evidence. Findings need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been

resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient.” *Id.*, p. 460 (Italics ours.)

This language not only does not require Commissioners to state the process of decision; it stands opposed to the holding of this Court’s opinion in this respect:

**E. Opinion Erroneously Holds That Determination Of Fair Market Value Is A Process, Since The Commission Must State The Process By Which It Arrives At An Award.**

This Court had previously held that the determination of just compensation was a matter of opinion and also “at best, a guess by informed persons” *U. S. vs. Miller*, 317 U. S. 369, 375. It previously had held that the judicial determination of an award cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula. *U. S. v. Cors*, 337 U. S. 325.

Now, however, the Commission must arrive at it by a process since they must state the process. Actually the process, if it can be labeled such, is at most a compromise between conflicting opinions and that involves credibility pure and simple. We submit that credibility is not something which can be reduced to a stated process, and further that fact finding does not contemplate such.

**F. Opinion Overlooks Principles That (1) District Court's Findings Of Fact Should Be Construed Liberally And Found To Be In Consonance With The Judgment So Long As That Judgment Is Supported By Evidence In The Record And (2) All Presumptions Are In Favor Of The Trial Court's Judgment.**

Prior to this Court's sanction of the decision of the Fifth Circuit, the captioned principle had been uniformly recognized as fundamental law. The effect of the decision is to abrogate this fundamental principle. Petitioners suggest that the Court overlooked the following cases in reaching its decision.

"1. Federal Civil Procedure, 2296: Findings are to be construed liberally in support of a judgment or order.

2. Federal Civil Procedure, 2296: Where, from facts found, other facts may be inferred which will support judgment, such inferences will be deemed to have been drawn."

*Triangle Conduit & Cable Co. v. Federal Trade Commission*, (7th, 1948) 168 F<sup>2</sup> 175 (1) & (2), affirmed sub nom *Clayton Mark & Co. v. Federal Trade Commission*, 336 U.S. 956 (1949).

"2. Federal Civil Procedure, 2296: Finding of fact of federal District Court should be construed liberally and found to be in consonance with judgment, so long as judgment is supported by evidence in record.

3. Federal Civil Procedure, 2296: Whenever, from facts found by federal District Court, other facts may be inferred, which will support judgment, such inferences will be deemed to have been drawn.

4. Federal Civil Procedure, 2283, 2284: Findings required by statute need not be in haec verba in order to support judgment of federal District Court, and ultimate test as to their adequacy is whether they are sufficiently comprehensive and pertinent to issues to provide basis for decision."

*Zimmerman v. Montour Railroad Company*, (3rd, 1961) 296 F<sup>2</sup> 97 (2) (3) (4).

"1. Federal Civil Procedure, 2296: District court's findings of fact should be construed liberally and found to be in consonance with judgment, so long as that judgment is supported by evidence in record."

*Blumenthal v. United States*, 306 U.S. 16 (1) (3rd, 1962).

To same effect: 5 Moore's Federal Practice 2661, Sec. 52.06.

Application of this rule of law would have required reinstatement of the District Court's judgment.

**G. Opinion Overlooks Principle That Factfinder Is Not Bound To Follow The Expert.**

On Page 4 of the opinion the Court states that the Commission allowed \$15,785 as severance damage without explanation. This statement overlooks Findings of Fact numbered 2 and 4 (R. 38), and the testimony

of the Landowner (R. 34). The Landowner testified to \$65.00 per acre severance damage, and other witnesses testified to \$45.00 per acre, and \$70.00 per acre (R. 34, 35). The opinion assumes that the finding of severance damage is erroneous because Landowner's expert only attributed \$12,435 to severance damage to the remainder.

Likewise, it states that in the second report the Commission awarded the Landowner \$52,950, a sum in excess of opinion of Landowner's expert of the value of the entire property. The same criticism is lodged against the report in the third case.

This is no basis for criticism of the reports if the opinion had followed previous rulings of this Court and other Courts. We submit that the Court overlooked such prior holdings as the following:

"Opinions of experts as to value of gas leases are, at most, of evidential value and not of such conclusive force that refusal to follow them constitutes error, whether such evidence is addressed to a jury, judge, or statutory board."

*Sartor v. Arkansas Natural Gas Corporation*,  
321 U. S. 620 (6).

"Failure to follow advice of experts is neither per se denial of constitutional rights nor even error which may be corrected on direct review in either a military or civil case."

*Williams v. Heritage*, (5th Cir. 1963) 323 F2d  
731 (4).

Further, the opinion charges that the Commission awarded \$3,500 as severance damage in the second report though the highest estimate was \$1,275. This is inaccurate. Landowner testified to an average value of the land excluding improvements of approximately \$154.00 per acre and a value of \$40.00 per acre after the taking, leaving a severance damage of \$7,980.00.

### CONCLUSION.

It would have been an easier course to follow not to have filed this motion. Only a sincere desire to point out the inconsistencies and the effect of this decision impelled Petitioners to file it. The effort has been made, and in this respect, the lawyer's duty both to his client and to the Court, has been performed. Nothing else really matters, save the sanctity of the law and the workability of the Rules.

WHEREFORE, Petitioners pray that a rehearing be granted and that the judgment of the District Court be reinstated.

Respectfully submitted,

W. LOWREY STONE,

LOWREY S. STONE,

JESSE G. BOWLES,

FORREST L. CHAMPION, JR.,

Attorneys for Petitioners.

**CERTIFICATE OF SERVICE.**

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1964, I served copies of the foregoing Petition for Rehearing for the Petitioners to the United States Supreme Court on the United States of America, Respondent, as follows:

By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,  
Assistant Attorney General,  
Washington, D. C.,

Messrs. Roger P. Marquis and Hugh Nugent,  
Attorneys, Department of Justice,  
Washington, D. C.,

Mr. Floyd M. Burford,  
United States Attorney,  
Macon, Georgia

and by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

FORREST L. CHAMPION, JR.,  
Attorney for Petitioners,  
Post Office Box 1975,  
Columbus, Georgia 31902.